

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NUMBER: J 3275/98

In the matter between:

**SUN INTERNATIONAL (SOUTH AFRICA) LIMITED
TRADING AS MORULA SUN HOTEL AND CASINO
and**

Applicant

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First

Respondent

DUMISANI H ZONDI

Second

Respondent

JOYCE CHAUKE

Third

Respondent

SOUTH AFRICAN COMMERCIAL CATERING

AND ALLIED WORKERS UNION
Fourth Respondent

JUDGMENT

JAJBHAY, AJ:

[1] **The parties:**

The applicant in this matter is Sun International (South Africa) Limited trading as Morula Sun Hotel and Casino. The applicant employed Joyce Chauke, the third respondent, (the employee) prior to her dismissal on 25 November 1998. The first respondent is the Commission for Conciliation, Mediation and Arbitration (CCMA).

The second respondent is Dumisani H Zondi, a Commissioner who presided over the conciliation proceedings that are relevant to this application. The fourth respondent is the South African Commercial Catering and Allied Workers Union (The Union) which represented the employee at the conciliation.

[2] This is an application in terms of section 158(1)(g) of the Labour Relations Act 66 of 1995 as amended (the LRA). The application is for the review and setting aside of the certificate of outcome of dispute dated 3 September 1998 (the certificate). This certificate was issued by the Commissioner.

[3] Section 158(1)(g) of the LRA affords this court the power to review the performance or purported performance of any function provided for in the LRA or any act or omission of any person or body in terms of the LRA, or any grounds that are permissible in law.

[4] **The issue to be determined:**

The issue to be determined in the present matter is whether the Commissioner in allowing the condonation for the late filing of the referral, has committed a gross irregularity, or mistake in such a manner that it amounts to a gross irregularity.

[5] **The facts:**

The employee was suspended with pay and without any loss of benefits by the employer on 17 November 1997. The reason for the suspension was that she failed to account for certain funds in her capacity as a cashier. The sum of R30 000,00 was unaccounted for at the end of the shift conducted by her on 12 November 1997. The employee was subsequently found guilty of the charges levelled against her and she was dismissed on 25 November 1997. The employee appealed against her dismissal. The appeal was unsuccessful. After the finalisation of the appeal proceedings, the applicant instituted criminal proceedings against the employee. For reasons that are not relevant for the purposes of this application, the charges were withdrawn.

[6] On 7 May 1998, the Union approached the applicant requesting a meeting to discuss the dismissal of the employee. A meeting was scheduled for 19 May 1998. At this meeting the applicant stated categorically to the Union that it had no intention of entering into any settlement agreement with either the employee or the Union.

[7] At the conclusion of the meeting the Union representative was advised by the applicant's representative that any referral of the dispute would be outside the 30 day period as contemplated in the LRA. On 11 June 1998, the Union served the prescribed LRA form 7.11 at the offices of the applicant. It was stated in the form 7.11 that "the necessary condonation application was attached relating to the late referral". However the evidence

indicated that no such application for condonation was attached to the form. The referral was approximately five months late. The CCMA served a notice of set down on the parties for the dispute to be conciliated on 3 September 1998.

[8] The applicant communicated a letter to the Union indicating that it had not received the application for condonation. This letter was faxed on 31 August 1998. The applicant did not receive any reply from the Union. A similar letter was submitted to the CCMA. The CCMA did not reply to the applicant's request. Thereafter, and on 2 September 1998, a second letter was communicated to the CCMA, setting out the fact that the applicant was not in receipt of the application for condonation. This letter was not replied to.

[9] At the conciliation meeting, the Commissioner indicated that he was desirous to execute his duty in terms of section 135 of the Act. At this time, the representative of the applicant objected to the procedure that was to be adopted by the Commissioner. It was brought to the Commissioner's attention that the CCMA did not have the necessary jurisdiction to conciliate the dispute due to the fact that the referral was not timeously served.

[10] The Union representative then produced an affidavit deposed to by himself (Jabulani Motau). The affidavit is dated 20 July 1998. In terms of this particular affidavit, the Union representative requested condonation for the late referral on the following ground: "From date on which Joyce Chauke was dismissed, the company led criminal charges against her on the second day being 2 November 1998. She was then busy with the court case up till 2 April 1998 whereby the criminal charges were withdrawn, but to her surprise to learn that she was not called back to work.

[11] Joyce then communicated with the company through their industrial relations

department to find out about the matter and was advised to go personally to the company. The industrial relations officer advised the applicant to refer the matter to CCMA. It is then that she came to our offices for our intervention. We then wrote to the company proposing a meeting trying to discuss possible ways of re-instating the applicant. The meeting failed to resolve the matter. The meeting was proposed of 19 May 1998.

[12] After failing at the company, we then referred the matter to CCMA. I am therefore requesting that the late referral should be condoned and the matter be heard through auspices of CCMA, otherwise the applicant have a strong interest in the matter as she strongly feels that she was unfairly treated and dismissed without the reasonable grounds."

[13] The above affidavit was deposed to on 20 July 1998, the LRA 7.11 form was served on 21 May 1998. It is not possible that the affidavit could have been attached to the referral form in the circumstances.

[14] At the conciliation hearing, after having been informed about the condonation application, the Commissioner allowed the Union representative to read the contents of the affidavit. The applicant's representative was allowed an opportunity to respond. The applicant's representative protested that he was not furnished with the affidavit prior to the proceedings. He continued by stating that had he been furnished with such a document, it would have afforded him an opportunity to investigate the contents and would have responded there to in writing. The applicant's representative further objected to the contents

of the affidavit in that it consisted of material that was hearsay in nature. The applicant's representative further drew the Commissioner's attention to the guidelines that were published in the government Gazette number 18936 on 5 June 1998, that governed the applications for condonation.

[15] It appears from the founding affidavit deposed to by the applicant's representative, that the Commissioner attempted to investigate "the merits of the matter". Immediately after the investigation, the Commissioner made the following statement: "It was in the spirit of the act to grant a party condonation, based on the contents of annexure JC6 (the affidavit) condonation is granted to the third respondent. There were no other reasons furnished".

[16] When the applicant's representative objected to the finding, the Commissioner responded by stating that the applicant may address the issue of condonation "once the matter proceeds to arbitration". Thereafter the Commissioner issued a certificate in terms of section 135 of the act. No attempt was made to conciliate the dispute.

[17] **The applicant's grounds for the review application:**

The applicant set out the following grounds to support its application for the review:

- “(i) the Commissioner committed misconduct in relation to the duties of a Commissioner; and/or
- (ii) the Commissioner committed gross irregularities in the conduct of

the aforesaid proceedings;

(iii) the Commissioner exceeded his powers in dealing with the aforesaid proceedings;

(iv) the Commissioner exceeded his powers as a Commissioner in terms of the act;

(v) the Commissioner exceeded his powers in terms of the bill of rights contained in the Constitution of the Republic of South Africa Act number 108 of 1996;

(vi) the Commissioner acted grossly unreasonably in performing his duties during the course of the aforesaid proceedings."

[18] **The Commission:**

It is trite that the CCMA was not created as a court of law (sections 112 to 114 of the LRA read with sections 165 and 166 of the Constitution of the Republic of South Africa). Carephone (Pty) Limited v Marcus N.O. and Others (1998) 19 ILJ 1425 (LAC). When Commissioners conduct compulsory conciliation, in terms of the LRA, this involves the exercise of a public power and function, because they attempt to resolve disputes between the parties in terms of the LRA.

[19] The view expressed by Froneman DJP in the Carephone matter at paragraph 20 "the constitutional imperatives for compulsory arbitration under the LRA and are thus based that the process must be fair and equitable, that the arbitrator must be impartial and unbiased, that the proceedings must be lawful and procedurally fair, that the reasons for the award must be given publicly and in writing, that the award must be justifiable in terms of those reasons, and that it must be consistent with the fundamental right to fair labour practices" are in my opinion equally

applicable when Commissioners are conducting a fact finding during the application for condonation.

[20] In terms of the Constitution, the CCMA is an organ of the state as defined in section 239 of the constitution. See Carephone supra at 1430F. The CCMA, in fact does perform functions of a judicial character, however these actions remain administrative in nature.

[21] In terms of section 33(1) and section 33(2) of the Constitution:

"Every person has a right to -

- (a) lawful administrative action when any of their rights or interests is affected or threatened;
- (b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;
- (c) be furnished with reasons in writing for administrative action which affect any of their rights or interests unless the reasons for that action have been made public; and
- (d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened."

[22] **The standard of review in terms of section 158(1)(g):**

In the matter of Juggath v Shanker N.O. and Another (1999) 2 BLLR 141 (LC) 141 LANDMAN, J in an application brought in terms of section 158(1)(g) of the LRA stated that "for the present purposes it is sufficient to accept that those grounds include the normal common law grounds for reviewing decisions of an administrative body" in discussing the

grounds that are permissible in law for the review of the performance of any function provided for in the LRA.

[23] In the unreported decision of Softex Mattress (Pty) Limited v Paper Printing Wood and Allied Workers Union and Others case number D473/97 MLAMBO, J at paragraph 10 stated the following: "As long as the council official or Commissioner is aware of the applicable principles and it can be showed that the council official or Commissioner applied his mind to the matter and applied the relevant principles to the fact before coming to his decision there can be no talk of a reviewable irregularity."

[24] The provisions of sections 33(1) and (2) of the Constitution quoted above deal with administrative actions. In my opinion, the act of determining whether the late referral has to be condoned or not, is an administrative action. In a complex society such as ours, administrative bodies such as the CCMA are increasingly necessary. The experience and expert knowledge of this body is invaluable. The Commission provides a mechanism for a speedy resolution of complex, and frequently technical, matters.

[25] The CCMA is a specialised body which administers a comprehensive statute regulating labour relations. In the administration of that function, the Commissioner is called upon not only to find the facts and decide questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the LRA. Our courts should exercise deference in reviewing the decisions of specialised administrative bodies such as the CCMA. This deference extends both to the determination of the facts and the interpretation of the law. However, where the evidence viewed reasonably, is incapable of supporting the Commissioner's finding of fact, or where the interpretation placed on the legislation is grossly unreasonable, the courts should interfere. If the above is shown, then

clearly the Commissioner could not have applied his mind to the matter at hand.

[26] **Application of the Law to the facts:**

In determining whether an employee has shown good cause as is envisaged in sections 191(2) of the LRA, the commissioner is enjoined to make a factual enquiry. See

Shoprite Checkers v CCMA and Another (1998) BLLR 510 and then Softex Mattress (Pty)

Limited supra. In Shoprite Checkers (Pty) Limited supra, PRETORIUS, AJ at

paragraph 21 said the following: "The section makes it clear that condonation is not there merely for the asking. The employee must tender an adequate explanation for the delay.

This explanation must be considered by the Commissioner. Due regard must also be had to the other generally accepted requirements for the ground of condonation as contemplated in the words 'good cause'."

[27] Upon a proper construction of the affidavit in support of the application for condonation, it cannot be said that the Commissioner applied his mind to the matter before him and took account of the relevant considerations prior to his conclusion. This being so, the Commissioner did not have jurisdiction to conciliate the matter. The subsequent issuing of the certificate, was accordingly an irregular step in the circumstances.

[28] The decision of the Commissioner is not capable of reasonable justification when regard is had to the factual premises on which it is based.

[29] **Order:**

Accordingly, I make the following order:

- (i) The certificate issued by the Commissioner in this matter is reviewed and set aside.

(ii) The matter is remitted to the Commission for Conciliation, Mediation and Arbitration for a proper determination of the condonation application

(iii) There is no order as to costs.

Jajbhay, AJ.

Acting Judge of the Labour Court of South Africa

DATE OF HEARING: 21st of April 1999

DATE OF JUDGMENT: 7th of May 1999

APPEARING FOR THE APPLICANT: Mr C Van Zyl

INSTRUCTED BY: Van Zyl's Inc