

---

**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD AT BRAAMFONTEIN**

Case No. J294/99

In the matter between:

**Northern Cape Provincial Administration**

**Applicant**

and

**Commissioner Geraldine Dunn, N O**

**First Respondent**

**Commission for Conciliation, Mediation**

**& Arbitration ("CCMA")**

**Second Respondent**

**Mohapi, Donald**

**Third Respondent**

---

**JUDGEMENT**

**PIENAAR, A J**

---

**INTRODUCTION**

1. This is an unopposed review in terms of section 158(1)(g) read with section 145 of the Labour Relations Act No 66 of 1995, as amended ("the Act").

- 
2. The Applicant, Northern Cape Provincial Administration, seeks to review the award of the First Respondent, given under the auspices of the Second Respondent, the Commission for Conciliation, Mediation and Arbitration ("CCMA").
  3. The First Respondent condoned the late referral of a dispute by the Third Respondent to the Second Respondent.
  4. The Applicant seeks an order to have the condonation granted by the First Respondent set aside.
  5. The proceedings before the First Respondent were not mechanically recorded and the Second Respondent therefore did not file a record of proceedings.

## **BACKGROUND**

6. The Third Respondent was dismissed by the Applicant on 31 August 1998 and referred his dispute to the CCMA on 17 November 1998 - some 48 days late.
7. The Third Respondent was found guilty and dismissed by the Applicant for 6 serious charges of misconduct. The charges related to unauthorised private calls on his cellular phone, spreading of malicious rumours, making of false allegations to the Public Service Commission, intimidating witnesses, and failure to have his salary adjusted.
8. Advocate J Brauns of the Durban Bar chaired the disciplinary enquiry and a copy of his findings formed part of the application before the Court.

- 
9. The Third Respondent relied on an aborted attempt to appeal against his finding due to a lack of poor and proper communication between the Applicant and his attorneys, as the ground for applying for condonation.
  10. The Third Respondent however did not proceed with his appeal despite having been informed by the Applicant on 21 September 1998 that he had to follow the proper channels for same.
  11. The Third Respondent's attorneys however also filed an affidavit, inter alia, stating that the only reason for the delay in lodging the appeal was due to lack of funds on the part of the Third Respondent.
  12. Apart from the above, the Third Respondent's attorney stated that he never consulted with the Third Respondent with regard to the referral to the CCMA (the Second Respondent).
  13. In reviewing the award of the First Respondent, the Court is guided by the decision of the Labour Appeal Court in Carephone (Pty) Limited v Marcus NO & others (1998) 19 ILJ 1425 (LAC).

## **GROUND FOR CONDONATION**

14. In dealing with the Application for Condonation, the Court follows the guidelines as set out in the case of Melanie v Santam Insurance Company Limited (1962) (4) SA 531 (A).

*"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 therefore, the prospects of success and the importance of the case. Ordinarily these facts are inter-related: they are not individually decisive, for what 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. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation maybe held to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked".*

15.The First Respondent was bound to follow the same guidelines in considering the application for condonation before her.

### **15.1.DEGREE OF LATENESS**

The referral by the Third Respondent to the Second Respondent was 48 days late. To the extent that this delay is in itself excessive, it warranted a good explanation.

### **15.2.EXPLANATION FOR DELAY**

15.2.1.The Third Respondent submitted contradicting versions for the late referral of the dispute to the Second Respondent.

15.2.2.The Third Respondent relied on the lack of communication between his attorney and the Applicant for the late referral, whilst the Third Respondent's attorneys, inter alia, stated that the delay in lodging the appeal was due to lack of funds and furthermore that they never

---

assisted the Third Respondent with the referral to the CCMA.

15.2.3. The First Respondent furthermore ignored the failure of the Third Respondent to either proceed with the appeal or to immediately refer the dispute to the CCMA after receiving the letter of the Applicant dated 21 September 1998, referred to above.

15.2.4. The Third Respondent tendered no proper explanation for the further delay in referring the dispute after the Applicant's letter of 21 September 1998.

15.2.5. The First Respondent ignored such contradictions and failure to provide a proper explanation for the further delays in granting the application for condonation.

15.2.6. Lastly it is noted that the Third Respondent was a Director: Human Resources and Labour Relations and, as such, not ignorant with the provisions of the law.

### **15.3. PROSPECTS OF SUCCESS**

15.3.1. An independent person of the Durban Bar conducted the disciplinary enquiry and the Third Respondent was found guilty of serious charges of misconduct. On reading Adv Brauns' finding, it is clear that the Third Respondent has no prospects of success in this matter.

15.3.2. The First Respondent erred in finding that there was "an equal amount of success on the part of both parties". This finding cannot be justified on the facts presented to the First Respondent.

### **15.4. IMPORTANCE OF THE CASE**

15.4.1.The Third Respondent placed no proper evidence before the First Respondent to substantiate the importance of the matter on his behalf.

15.4.2.It is clear that the Third Respondent was a high profile senior employee of the Applicant and, according to the Applicant, in a position to severely damage the public service, which is subject to public scrutiny and attack by the media.

---

## FINDING

16. I am satisfied that the findings of the First Respondent cannot be justified on the facts presented to her.

17. I furthermore find that it is not necessary to refer the matter back to the Second Respondent insofar as the granting of condonation was clearly unjustifiable.

18. The ruling by the First Respondent dated 30 December 1999 under Case No. NC2479 is hereby reviewed and set aside.

19. The ruling of the First Respondent is substituted by the following:

The Application for Condonation is dismissed.

20. Insofar as the Applicant did not seek costs, no order as to costs is granted.

## CASE LAW REFERRED TO:

21. The following cases were referred to in the above-mentioned judgement:

Melanie v Santam Insurance Company Limited (1962) (4) SA 531 (A).

Carephone (Pty) Limited v Marcus NO & others (1998) 19 ILJ 1425 (LAC).

---

**ACTING JUDGE PIENAAR**

31 October 2000

**PARTIES APPEARING BEFORE THE COURT:**

**APPLICANT:**

Adv Leon Halgryn

(Instructed by Joubert Attorneys)