

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO J5860/00

In the matter between:

METZ TRANSPORT (PTY) LTD

Applicant

and

**THE FURNITURE, BEDDING AND UPHOLSTERY
INDUSTRY BARGAINING COUNCIL, GREATER
NORTHERN REGIONS**

First Respondent

MRS M MASTERS NO

Second Respondent

JACOB MOLEFE

Third Respondent

A BADENHORST NO

Fourth Respondent

JUDGMENT

JAMMY AJ

The Fourth Respondent in this matter was joined in the proceedings on application to that effect made by the Applicant subsequent to the institution by it of proceedings in which it seeks an order reviewing, correcting and setting aside the condonation of a late referral of its dispute with the Third Respondent for conciliation by the First Respondent. Both parties were initially unaware that the condonation order was in fact made by the Fourth

Respondent and not the Second Respondent, as was at first thought to be the case. The true factual position is not in dispute and the joinder of the Fourth Respondent is accordingly not opposed.

The facts of the matter are variously described in the papers as being “**confusing**” and “**tedious**”. In essence, they are the following.

The Third Respondent was dismissed by the Applicant on 20 April 1999. That dismissal was alleged to be unfair and, on 28 April 1999, well within the thirty day time period prescribed in Section 191 of the Labour Relations Act 1995, the dispute was referred by the Applicant, through his trade union, to the First Respondent for conciliation. In that referral the employer company was cited as Basemakers (Pty) Ltd. The reason for this was the Third Respondent’s incorrect belief that Metz Transport (Pty) Ltd, (the Applicant *in casu*) was a wholly owned subsidiary of Basemakers (Pty) Ltd, which was therefore technically his employer.

Following a delay of some four months, the First Respondent scheduled a conciliation hearing for 26 August 1999 and notified the parties to that effect. Basemakers (Pty) Ltd immediately responded in writing to the First Respondent advising that the Applicant was at no stage employed by it and that for that, and other technical reasons, the referral was defective.

When so advised by the First Respondent on 18 August 1999, the Third Respondent, on the advice of his trade union, immediately withdrew his initial referral and submitted a second referral to the First Respondent, bearing that date. In this instance Metz Transport (Pty) Ltd, was cited as his employer.

The date of the Third Respondent’s dismissal having, as stated, been 20 April 1999, this second referral was now technically approximately three months out of time. It was not, at that stage, accompanied by any application for condonation in that context.

Pursuant to that second referral, the First Respondent, by telefaxed letter dated 19 August addressed to the Third Respondent's trade union and to **"METZ BEDDING"**, informed them of a conciliation meeting scheduled for 26 August 1999.

On 25 August 1999 the Transvaal Furniture, Bedding and Upholstery Manufacturers Association wrote to the First Respondent on behalf of the companies within the Metz Group, including the Applicant, Metz Transport (Pty) Ltd and **"METZ BEDDING"**. The letter recorded that the employer, Metz Transport (Pty) Ltd had **"to date not received a mediation notice"**, that the dismissal in question had occurred four months previously, that the first referral was defective as the incorrect employer was cited, that conciliation did not take place within the prescribed thirty day period and that the second referral was also defective as having been late and not supported by a condonation application. The letter concluded as follows -

"Should a mediation letter eventually be sent to the correct employer, we will oppose condonation of the late referral.

Should you further deem it wise to condone the late referral, we will have no hesitation in taking you on review to the Labour Court to test your reasons for granting condonation".

Presumably on the strength of that letter, the Applicant did not attend the conciliation meeting on 26 August and on 9 September 1999, a certificate to the effect that the dispute remained unresolved as at that date, was issued by the First Respondent, signed to that effect by the Conciliator, whose name was given as Mrs M Masters.

The dispute was then referred by the Third Respondent to the Commission for Conciliation Mediation and Arbitration (**"the CCMA"**) for Arbitration, the hearing of which was duly scheduled for and commenced on 29 February 2000. At that hearing the Applicant contended, and the Commissioner ruled, that the CCMA lacked jurisdiction to determine the dispute as the Third Respondent had not applied for condonation of his late referral.

The Third Respondent was advised to re-refer the matter with a simultaneous condonation application and on 23 August 2000 (some six months after the CCMA ruling referred to,) proceeded to do so. The application for condonation was opposed by the Applicant as had earlier been its indicated intention and it is common cause that an answering affidavit was filed by it with the First Respondent on or about 31 August 2000.

The next development as far as the Applicant was concerned was the receipt from the First Respondent of a notice of a conciliation meeting to be held on 26 October 2000. The Applicant's representatives immediately responded to that notice to the effect that the Applicant had not been informed of the outcome of the application for condonation. On 23 October 2000 the First Respondent replied as follows –

“Your letter dated 16 October 2000 refers.

No receipt of condonation outcome. The Council hereby informs you that condonation has been granted and that the matter is set down for 26 October 2000 at 10:30 in Room 802, 8th Floor”.

It is not disputed that it was only on 14 February 2001, after numerous written requests to the First Respondent to furnish them, that the Fourth Respondent's written reasons dated 4 October 2000 for the granting of condonation, were received by the Applicant. Those reasons were in the form of a short letter and it is appropriate, in my view, that they be here recorded –

“REASONS:

- 1 The former General Secretary of the Council Mr P C Smit received the referral well within time. To and extend (*sic*) he tried to apply Section 135 of the Act, to attempt to resolve the issue.**

- 2 **Mr Metz, the Managing Director of Metz Transport (Pty) Ltd agreed to an extend (*sic*) that they would try and settle out of Conciliation. He then went overseas and the matter was suspended awaiting his return. Upon return he was not interested in settling nor further discussion of the matter.**
- 3 **The Applicant's representative requested the Secretary to issue a certificate which he failed to do.**
- 4 **The employer however did not file an opposing application as to why condonation should not be granted.**
- 5 **The Applicant requested the former Secretary to submit an affidavit concerning the above, which he later declined to effect.**
- 6 **The Applicant submitted all relevant documents including an application for condonation and showed good cause as to why condonation should be granted. Therefore the late referral was condoned".**

. What is, *inter alia*, immediately apparent from those reasons is that the Applicant's opposing affidavit in the condonation application, which was filed with the First Respondent at the end of August 2000, was not before the Fourth Respondent when the application was considered by him and his ruling was made.

. The conciliation meeting was held as scheduled on 26 October 2000 and was attended by the Applicant and the Respondents. The dispute was not resolved and on that date a certificate to that effect was issued and signed by the Second Respondent. Pursuant thereto the Third Respondent has referred the matter for the second time to the CCMA for Arbitration, which, at this time, is still pending. In the interim, it is the Fourth Respondent's condonation ruling of 4 October 2000, which is challenged in these proceedings.

- . The factors advanced by the Third Respondent in his application for condonation before the Fourth Respondent, were, simply stated, that although the reference in question was fourteen months out of time it had originally been submitted on time but citing the incorrect employer, that further delays were the result of administrative confusion between executives of the Applicant and the General Secretary of the First Respondent and that the Applicant had not attended the conciliation meeting as a consequence of incorrect notification thereof by the First Respondent. Cursory submissions were made regarding the Third Respondent's prospects of success and the prejudice which he contended that he would suffer if the application was refused. This however, simply related to the fact that he had been unfairly dismissed and unable to find alternative employment.

- . The Applicant's opposition to the condonation application, as recorded in its replying affidavit, was based on what it submitted was the extreme lateness of the referral, the fact that as early as 29 February 2000 the Third Respondent had been alerted by the CCMA to the effect that he should make a fresh referral supported by an application for condonation, that this notwithstanding he took approximately a further seven months to do so and that he had not shown realistic prospects of success in the main dispute.

- . In granting condonation, the Applicant now submits, the Fourth Respondent based his findings on **"non-existent facts and facts that are irrelevant for the purposes of the condonation application"**. The trite principles to be taken into account in any application of that nature were ignored by him. Save for contending that the lengthy delays which occurred were attributable to persons other than himself, the Third Respondent had made no further attempt to explain them.

- . In the result, the Applicant contends, the Fourth Respondent's findings are grossly irregular and not justified on the facts presented to him.

- . In its opposition to this application, the Third Respondent raises an initial point *in limine*. The condonation ruling and the subsequent issuing of the certificate sought to be

reviewed and set aside are not, it submits, reviewable. In the first instance they are of an interlocutory nature and do not put an end to the dispute between the parties. Secondly incomplete proceedings before the CCMA should only be subject to review where grave injustice may otherwise result. That, it submits, is not the case in the present matter.

I have greater difficulty with the first of these submissions than with the second. Whilst it is correct that the granting of condonation and the issue of the non-resolution certificate by the Fourth Respondent occurred in the course of the dispute resolution procedure invoked by the Third Respondent and may, in the strict sense of that term, be defined as interlocutory, it seems to me that this is a semantic issue rather than a pragmatic one. The Fourth Respondent's finding determined the entitlement of the Third Respondent to pursue the process. Had condonation been refused, that, as the Third Respondent submits, would have aborted the process and, in a proper case, been subject to review. It does not however follow, in my opinion, that the contrary decision, allowing condonation and thereby the further pursuit of the process, can validly be differently categorised. The issue of whether or not the late referral of the dispute for conciliation should or should not be allowed, stands alone as an independent matter for adjudication. In that context the Fourth Respondent's determination is, in a proper case, reviewable.

Apposite to the second issue raised *in limine* by the Respondent, is the comment in

Erasmus: Superior Court Practise at B1-382

“As a general rule a Superior Court will not by way of entertaining an application for review interfere with incompleting proceedings in an Inferior Court”.

What the Applicant is seeking to do in this matter, the Third Respondent contends, is to conduct this litigation on a piecemeal basis and disapproval in that regard, applicable it is submitted both to appeals and reviews, is expressed, by way of example, in

Wahlaus v Additional Magistrate, Johannesburg 1959(3) SA 113(A) at 119 C-120E

The issue in that matter was an application for the review of a Magistrate's decision and, finding no ground for such review on account of any irregularity, Ogilvie-Thompson JA commented:-

“Nor, even if the preliminary point decided against the accused by a Magistrate be fundamental to the accused's guilt, will a Superior Court ordinarily interfere – whether by way of appeal or by way of review – before a conviction has taken place in the Inferior Court”.

Reference in that judgment was also made to the comments of the authors of **Gardiner and Lansdown (6th Edition Volume 1 Page 750)** where, dealing with the jurisdiction of a Superior Court in review or appeal proceedings, the following is stated -

“In general however, it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the Court below, and to the fact that redress by means of review or appeal will ordinarily be available”.

Those policy considerations, in my opinion, will constitute the governing criteria in a determination of this nature where all other things relevant to the issue are equal. Those other factors necessarily involve an assessment of the broad criteria for review which have been established in a line of relatively recent authorities. Essentially, the Fourth Respondent's ruling will be vulnerable if it can be shown to the Court's satisfaction that it is not justifiable on the submissions before him to a degree which indicates that he could not properly have applied his mind to them.

It is common cause that the Fourth Respondent was not at the time aware of the fact of the Applicant's opposition to the condonation application and that, through no apparent fault of his own, the Applicant's answering affidavit was not before him and although it had been properly filed, had not been brought to his attention.

In determining the matter therefore, all that was before the Fourth Respondent was the

Third Respondent's application and the correspondence supporting it. The explanation for the delay in referring the matter must therefore be assumed to have been acceptable to him. The allegation of unfair dismissal was not one on which he was required to adjudicate. It did however constitute the substance of the dispute which had been referred. Its validity or otherwise would ultimately be determined in the Arbitration proceedings which would now ensue.

No case in these circumstances, has in my opinion been established to substantiate the allegation that the Fourth Respondent did not apply his mind to the material before him and/or that his determination was not justified on those submissions and uncontested facts. Whilst it is true that the Third Respondent's prospects of success were, in general terms, inadequately analysed in his application, that alone does not seem to me to be a reason for denying him the opportunity for that aspect of the matter to be fully and properly determined.

For all of these reasons, I conclude that no adequate grounds have been advanced by the Applicant to warrant the interference by this Court with the condonation ruling by the Fourth Respondent or, on any other basis, to impugn the validity of the certificate of outcome issued pursuant thereto. The order that I make is accordingly the following.

The application is dismissed with costs.

B M JAMMY

Acting Judge of the Labour Court

9 July 2001

Representation:

ant: Advocate S Bernhardt instructed by Julian Pokroy Attorney

t:: Advocate FA Boda instructed by Diso Ndlovu Attorneys