CASE NO : D847/2000 Revised/Reportable
DATE : 1 March 2001
PHILIP NDOKWENI versus GAME STORES & ANOTHER

JUDGMENT

PILLAY J

[1] The applicant referred the matter for conciliation. He failed to attend the conciliation. The conciliating commissioner dismissed the matter. The applicant referred the dispute for conciliation afresh. As it was more that 30 days after the dismissal an application for condonation was made. The commissioner refused to grant condonation. This is a review of the commissioner's decision refusing condonation.

[2] The first ground of review was that as the language and meaning of section 135(5) of the Labour Relations Act No 66 of 1995 (the "LRA") is clear, the commissioner ought to have issued a certificate in terms of that section. His failure or refusal to do so was therefore *ultra vires*.

[3] Section 135(5)(a) provides:

"When conciliation has failed or at the end of the 30-day period or any further period agreed between the parties -

(a) the commissioner must issue a certificate stating whether or not the dispute has been resolved."

There is no ambiguity in the section. The commissioner appointed must issue a certificate at the end of the 30-day period. The commissioner must do so, for example, if the Commission for Conciliation, Mediation and Arbitration, (the "CCMA") omitted to schedule a conciliation within 30 days of the referral. Or, if the parties agree that the matter cannot be conciliated and jointly request the CCMA to issue the certificate. Or, as in the case of *Langelihle Mncwabe v Thami Ntulu. & Others*, unreported case No D894/99, the union representative attends a conciliation in the absence of the applicant. Essentially, the applicant or his representative need to do something to dispel any inference that the applicant had abandoned or withdrawn the referral.

[4] However, if the referring party fails to attend the conciliation, the commissioner is entitled to take that

fact into account in deciding whether to issue the certificate. It is trite law that a party who fails to attend proceedings, after being properly notified, is in default. The commissioner may also reasonably infer from the failure to attend, that the referral has been abandoned or withdrawn. In these circumstances the commissioner was not obliged without more to issue a certificate.

[5] The commissioner has to be fair and even-handed to the employer and employee parties. An employer who attends a conciliation in the absence of the employee is entitled to have it finalized. Conciliation is a vital process preceding an arbitration before the CCMA. It is not merely an opportunity to resolve a dispute. If the dispute is not resolved, the parties could exchange information so that they are better prepared for arbitration. By issuing a certificate without giving the employer who attends a conciliation in the absence of the employee an opportunity to conciliate the dispute or to exchange information relevant to the arbitration would be unfair to the employer. If this practice were allowed, then it would be open to a shrewd employee not to attend the conciliation and to proceed direct to arbitration. There, the employer who bears the onus of proving the fairness of the dismissal and who does not know what case it has to meet, could be severely disadvantaged. Applications for postponement are not readily granted by the CCMA. Conciliation is therefore not a mere procedural formality, compliance with which can be lightly dispensed with.

[6] The applicant or his union should have informed the commissioner of their difficulties in attending the conciliation and the applicant's desire to proceed with the dispute. In this way no inference could have been drawn that the applicant had abandoned or withdrawn the referral.

[7] Furthermore, MLAMBO J's comments in *Hotel, Liquor, Catering and Allied Workers Union & Others v Glamorock North (Pty) Ltd and ITS Trading Divisions or Branches* 1999 20 ILJ 2372 are apposite:

"Where the applicant stays away from the conciliation meeting a different approach seems justifiable. It is the applicant who drives the process and, if the applicant stays away, there is no conceivable reason to issue the certificate. In the situation it is only proper to regard the referral as having lapsed unless just cause is shown which would justify a rescheduling of the

conciliation meeting."

In the circumstances the failure or refusal by the commissioner to issue the certificate was consistent with the provisions of section 135(5)(a).

[8] The second ground of review was that the commissioner's refusal of condonation was *ultra vires* and should be set aside because -

(a) the Rules Regulating the Practice and Procedure for Resolving Disputes through Conciliation and Arbitration Proceedings, (the CCMA rules), were not in force at the time when the condonation application was made and should therefore not have been applied to the process.

This ground was not vigorously pursued as it was common cause that the CCMA rules had not been published and in force at the time and that it was the practice which was embodied in the CCMA rules that was applied.

(b) Rule 7.7 of the CCMA rules was itself *ultra vires* as it was not authorised by section 135 of the LRA.

(c) The practice which was applied and which was effectively the content of rule 7.7 was not authorised by section 135 and therefore *ultra vires*.

Points (b) and (c) will be dealt with together below.

(d) The effect of rule 7.7 was to protract procedures.

As the majority of referrals to the CCMA were from employees, rule 7.7 discriminated against them on the basis of class in violation of their constitutional right to equality. Mr *Mazwi* wisely withdrew the latter part of this submission during argument.

[9] Sight should not be lost of the fact that this is a review of the decision of the commissioner to refuse condonation. It is not a review of any decision of the CCMA to implement a practice, but a review of the commissioner's application of the practice to the application for condonation and the ensuing refusal thereof. The content of rule 7.7 will have to be analysed in order to determine whether the practice of it was *ultra vires*.

[10] Rule 7.7 provides:

"If a referring party fails to attend a conciliation hearing at the scheduled time, the referral will

be regarded as having been abandoned by the referring party. If the referring party later decides to pursue the matter, the referring party will have to refer the dispute again under the same case number and, if necessary, apply for condonation explaining -

(a) the degree of lateness;

(b) the reasons for the lateness;

(c) the referring party's prospects of succeeding with the referral and obtaining the relief sought against the other party;

(d) the balance of convenience including any prejudice to the other party; and

(e) why the referring party did not attend the initial conciliation hearing."

[11] Application of the CCMA rules as rules before they were published would be *ultra vires* as section 115(6)(a) provides that the CCMA rules come into effect only after publication in the Government Gazette. In this case, the commissioner applied a practice which happened to be the content of rule 7.7. To be *intra vires* and applicable, the practice must be consistent with section 135. As a practice, there is no need for compliance with the formality of publication in the Government Gazette.

[12] In order to determine whether the practice of rule 7.7 is *ultra vires*, regard must be had to section 135 of the LRA. Section 135 is silent about what steps must be followed if any party fails to attend a conciliation. From a case management perspective, the CCMA needs to dispose of the conciliation in some way as an administrative organ (*Making You Whistle, the Labour Appeal Court's Approach to Reviews of CCMA Arbitration Awards ILJ 21 1506 at 1516*). To do so without giving the referring party, who could be prejudiced by its actions, an opportunity to be heard prior to disposing of the matter, could be unfair. The prejudice for the referring party is that the certificate of non-resolution may not be issued. Consequently, the referring party would not be able to pursue its claim except with the leave of the Labour Court on review. A similar opportunity to be heard need not be extended to the non-referring party who fails to attend the conciliation as it should be aware that the commissioner could issue a certificate after 30 days.

[13] The practice of rule 7.7 therefore fills a procedural and administrative vacuum in the

legislation. It is not expressly prohibited by the LRA.

[14] Regard must also be had to the purpose of section 135, in particular, in the context of the objectives of the LRA in general. One of the stated purposes of the LRA is to provide for the effective resolution of disputes. The practice complained of is one which permitted the applicant to re-refer conciliation to the CCMA with an application for condonation. If such a practice had not been in place, then, in view of my finding on the first ground of review, the applicant would have had no further recourse to the CCMA. It would have had to review in the Labour Court the commissioner's decision not to issue a certificate. That would have protracted the dispute more than if a condonation application were to have been processed in the CCMA. Furthermore, the test for a successful review in the Labour Court would have been more difficult to satisfy than an application for condonation before the CCMA. The practice of rule 7.7 is therefore consistent with the purpose of section 135 and the LRA generally. It is therefore not *ultra vires* the LRA.

[15] It was common cause that the CCMA applied rule 7.7 as a practice before it came into force. At the time that it made the referral, the union ought to have been aware that the CCMA rules did not have any force or effect. Yet it acquiesced in the application of the practice without objection by re-referring the conciliation and initiating the condonation application. A party who believes that an irregularity is being perpetrated and allows it to occur without protest cannot be heard to complain later. *(Fidelity Guard Holdings (Pty) Ltd v Epstein NO & Others* 2000 12B LLR 1389 (LAC).) It could have reserved its rights and continued with the process; it may well have been satisfied with the outcome. Alternatively, it could have challenged it timeously. It could have refused to apply for condonation and immediately have approached the Labour Court. Why it did not do so is not explained.

[16] The commissioner essentially provided a procedure where none existed to assist the applicant. It was hardly in the interests of the employer who would, no doubt, have preferred to regard the matter as finalised once the certificate was not issued. In these circumstances the Court finds that the commissioner acted *bona fide* and within his general mandate to resolve disputes effectively. In a review of the decision by the Commissioner for Inland

Revenue not to refund a taxpayer any overpaid tax, the Appellate Division as it then was, refused to interfere in the Commissioner's decision even if it was wrong in law, provided he had formed his opinion *bona fide* and there was no decision of a competent Court to the contrary. (*CIR v City Deep Ltd* 1924 AD 298.)

[17] Mr Mazwi on behalf of the union submitted for the applicant that compliance with the practice was prejudicial to the employee because of the delay in finalizing the dispute. Naturally, if the commissioner was not required to apply his mind to the failure by the referring party to attend the conciliation, the issuing of the certificate would be the quickest way to get past the conciliation phase of the process. But as I have found above the commissioner may have regard to the non-attendance by the referring party when deciding whether to issue the certificate. The practice offered the employee a quicker and cheaper procedure than having to approach the Labour Court. There was always the possibility that condonation could have been granted. The commissioner's decision was final and binding, subject only to review at the instance of any of the parties. It was the employee's choice to review the commissioner's decision. Any prejudice that the employee now suffers as a result of the delay in finalising the matter can hardly be attributed to the commissioner or the CCMA or the application of the practice.

[18] In *Ellis v Morgan*, *Ellis v Desai* 1902 TS 576 the Court in the absence of exceptional circumstances, refused to quash proceedings which were not materially prejudicial to the applicant. A similar approach was adopted by SOLOMON JA in *Myers v SA Railways and Harbours* 1924 AD 85 at 93 where he stated that:

"Any departure from the strict wording of the regulations was merely of a formal or trivial nature and that the plaintiff was in no way prejudiced."

TINGLE JA in *Jockey Club of South African & Others v Feldman* 1942 AD 340 at 359 was equally unequivocal when stating in relation to private tribunals that:

"I am not prepared to accept as a rule applicable to all cases of irregularity in the proceedings of private tribunals the proposition that an irregularity which is calculated to prejudice a party entitles him to have the proceedings set aside. No doubt such irregularity *prima facie* gives him such a right, but, if it is clear that in the particular case the irregularity caused such party

no prejudice, in my judgment he is not so entitled."

MILNE AJ in *Estate Geekie v Union Government & Another* 1948(2) SA 494 at 503 accepted in passing that:

"... there are cases where, although there has been a decision following upon an *ultra vires* act or omission, the Courts will refuse to interfere because an *ultra vires* act or omission complained of is not calculated to prejudice the party complaining of it."

[19] In the circumstances, the applicant was not prejudiced by the commissioner applying the practice to process the dispute. Even if the practice and consequently the process were *ultra vires,* then in view of the authorities cited above the commissioner's decision to apply it does not fall to be reviewed and set aside.

[20] The third ground of review was that the commissioner did not give written reasons for dismissing the application for condonation as required in terms of section 33 of the Constitution of the Republic of South Africa Act No 108 of 1996 (the "Constitution"). Section 33(2) of the Constitution provides:

"Everyone whose rights have been adversely affected by administrative action has a right to be given written reasons."

The commissioner's written reasons dated 29 March 2000 were provided in compliance with rule 7A(3) read with rule 7A(2)(b) of the Rules of the Labour Court. They were as follows:

"After having considered the submissions made by both parties to this referral in terms of section 191(2) as well as the Guidelines for Condonation Application, the request for condonation for the referral of an alleged unfair dismissal has been denied. This decision was arrived at based on a conspectus of all the stipulated criteria as to whether or not the applicant has establish 'good cause' as is required by section 191(2) of the LRA."

He declined to add to these reasons.

[21] Neither section 33(2) of the Constitution nor the LRA suggest the form or content of the reasons given for any ruling by commissioners. It is implied from section 138(7)(a) which provides that arbitration awards must be issued with brief reasons, that reasons for rulings should also be brief. In *Moletsane v Premier of the Free State & Another* 1996(2) SA 95 the

Court, dealing with section 24 of the Constitution Act of 1993, expressed doubt without deciding whether the omission to furnish reasons would vitiate the steps taken by an administrative body. In that case, the reason for suspension of an educator, namely, that the suspension was pending a departmental investigation into alleged misconduct, was held to be sufficient. The failure to furnish any or adequate reasons for administrative action could vitiate the steps taken by the body if the only reasonable reference to be drawn from the failure is that no adequate reason exists for the action. *(Administrative Law by Lawrence Baxter,Juta & Co. Ltd 1984, Third Impression 1996, Pages 226-233; Minister of Law and Order and Others v Hurley and Another (AD) 1986(3) 568.)*

[22] The commissioner's reasons in this case appear to be *pro forma* standard reasons that may be cut and pasted in any condonation application that is refused. His reasons do not manifest, for example, why he had found that there was no 'good cause' established. Commissioners should provide such reasons as would demonstrate that they applied their minds to the facts of the case. The reasons should also inform the parties briefly why they were successful or not successful. However, the failure of the commissioner in this case to provide further and better reasons does not, on its own, vitiate his decision. His reasons do provide the legal though not the factual basis for refusing condonation. What facts he took into account are not before the court. There has therefore been superficial compliance with section 33 of the Constitution read in the context of the LRA.

[23] The applicant has a further difficulty in that it has not provided an adequate record of the proceedings before the commissioner. Consequently, the Court is not in a position to determine what facts the commissioner took into account and whether his decision was rationally connected to the material before him. (*JDG Trading (Pty) Ltd t/a Russells v Witcher Bonita NO & Others* unreported case D8/2000.) If the facts now before the Court were also before the commissioner, then the commissioner's decision would not be reviewable. I refer to *inter alia* the union representative's evidence that he was in hospital on the day of the conciliation and therefore unable to attend. The document that was tendered to support this evidence showed that the representative had in fact been discharged before the conciliation.

[24] In the circumstances the application is dismissed. However, as the applicant presented an arguable case on novel points, there is no order as to costs.

TRANSCRIBER'S CERTIFICATE

I, the undersigned, hereby certify that, so far as it is audible, the aforegoing is a true and correct transcript of the proceedings recorded by means of a mechanical recorder in the matter of:

PHILIP NDOKWENI versus GAME STORES & ANOTHER

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IN THE LABOUR COURT OF SOUTH AFRICA Revised/Reportable

HELD AT DURBAN Case No D847/2000

In the matter between:

PHILIP NDOKWENI **Applicant**

and

GAME STORES **First Respondent**

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **Second Respondent**

N C CAHILL N 0 **Third Respondent**

PRESIDING OFFICER JUDGE PILLAY

FOR APPLICANT MR MAZWI

FOR RESPONDENT MR FARNELL

JUDGMENT
1 MARCH 2001

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