NOT REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

CASE NO D474/1999

DATE 2001/03/09

In the matter between:

BONGANI NDLULI Applicant

and

ROMATEX LTD
t/a GOLD REEF SPECIALITY CHEMICALS First Respondent

COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION Second Respondent

JUDGMENT DELIVERED BY
THE HONOURABLE MR ACTING JUSTICE GERING
ON 9 MARCH 2001

ON BEHALF OF APPLICANT: MR A S KADER

MR R C W PEMBERTON

TRANSCRIBER
SNELLER RECORDINGS (PROPRIETARY) LTD - DURBAN

J U D G M E N T

GERING AJ

This is an application for condonation in respect of an application for review of an arbitration award given by Advocate Majake on 22 February 1999 in terms of sections 145 and 158(1)(g) of the Labour Relations Act 66 of 1995 (hereinafter referred to either as "the Act" or as the "LRA").

The award was given on 22 February 1999 and in terms of section 145 there is a six week period. Section 145(1) provides that:

"Any party to dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award (a) within six weeks of the date that the award was served on the applicant unless the alleged defect involves corruption."

The present case does not involve any corruption and the period of six weeks would, therefore, have run from the time that the award was served on the applicant, not necessarily the time when the applicant became aware of the award.

The word "serve" in the Act was defined in section 213:

erve' is defined as meaning to send by registered post, telegram, telefax or to deliver by hand."

In the present case it seems that the notice was served by telefax sent to the Trade Union and considerably more than six weeks would have elapsed from the time that application was made by the applicant for the setting aside of the award. The applicant actually alleges that he physically received delivery of the award on 31 March 1999 as opposed to the date of the fax which was 5 March. So there is a difference of some 26 days. There is, however, no confirmatory affidavit by Mr Cepho Sibiya who is referred to in the applicant's affidavit to substantiate the fact that the notice was received by Mr Sibiya and put into the wrong box and was only handed to the applicant on 31 March. Even on the basis of the time running from 31 March the filing of the application was slightly out of time but of course a much smaller period.

But is not only in regard to the failure to file the papers on due time, it is also that the application itself, as originally served, was defective. Firstly, it should not refer to section 158 of the LRA

because the case of *Carephone (Pty) Ltd v Marcus N.O.* (1998)11 BLLR 1093 (LAC) makes it quite clear that the relevant section for a review of an arbitration award is not section 158 but is section 145.

Quite apart from the wrongful inclusion of section 158 there has also not been on the papers, as originally filed, compliance with the relevant Rule 7A of the Labour Court headed "Reviews". This is a very explicit provision setting out the times within which, and the sequence under which, the various papers have to be filed when there is an application to review a decision of an arbitrator under the CCMA. It is quite clear that the papers did not comply either as to time nor as to content with the provisions of Rule 7A. Thereafter an attempt was made to rectify the position but that took place some time later and in fact the actual application for condonation, which should have been made very much earlier because all the earlier steps required condonation, was only filed with the Court on 2 March 2001. The amending process amending the original papers so as to comply more completely with the rules was only completed on 17 February 2001 when the amended pages were filed.

Accordingly, it seems clear that both as to time and as to content the review application papers submitted by the applicant to review and set aside the reward made by Advocate Majake, dated 22 February 1999, were defective and required condonation. Condonation, of course, is a matter in the discretion of the Court which must be exercised judicially and one must take into account the explanations for the delay, the length of the delay and the prospects of success. It may well be that if the applicant had had substantial prospects of success I would, in the exercise of my discretion, sitting as a court of law and equity, have been prepared to condone the defects even though they were substantial and required condonation. I would have been prepared to exercise my discretion to condone those defects had there been substantial prospects of success in attacking the award of the arbitrator In terms of section 145 of the LRA, as explained authoritatively by the Labour Appeal Court in the *Carephone* case. Although the *Carephone* case has been subject to some questioning and criticism, it is a decision of a higher Court than this Court and in terms of section 182 of the LRA a judgment of the Labour Appeal Court is binding on the Labour Court. In my view it is the duty of the Labour Court to respectfully apply the reasoning of the Appeal Court in the *Carephone* case.

Until that judgment is changed by the Labour Appeal Court it is the duty of this Court to apply the reasoning and decision of the Labour Appeal Court in the *Carephone* case.

On the basis of that reasoning and that interpretation of section 145 I do not find a sufficient case made out to establish grounds for attacking the validity of the arbitration award.

The allegations relating to misconduct and gross irregularity are very bald and thin indeed. The two main points that seem to be raised on the papers firstly relate to the question of the representation by the Trade Union, the representative turning up late at the arbitration hearing. It is not the duty of the CCMA or of the arbitrator to ensure that the representative chosen by the employee arrives on time. In fact it did so happen that the employee was there on time and the proceedings started in the absence of his representative but some time during the course of the day the representative did turn up. That will be found in the bundle at pages 120 to 122, when the representative, a Mr T M Sibiya, said that he had received a notice that there was going to be a conciliation and not an arbitration, and when he was invited to stay on to assist the employee the commissioner said (see document B122),

e that as it may, at this late hour you may continue. You will just have to join us now."

and Mr Sibiya replied,

o, I am not in a position to join you because I do not know what it is actually about."

Accordingly, the Commissioner excused Mr Sibiya. There was no application by either Mr Sibiya or the employee for a short adjournment, which might well have been granted had it been asked for, but there was simply a cursory statement by the representative that he was not in a position to join because he did not know what it was about. I must say that does not seem to be the correct way for a representative of the Trade Union to assist its member.

Accordingly, I do not find any basis for saying that the Commissioner handled the matter improperly in proceeding with the case either at 9.30 when it started or continuing to proceed when Mr Sibiya turned up and then decided not to continue.

The other point that is raised on the papers is the statement of the use of the phrase "shut up". On a reference to page B150 the full statement is as follows:

r Ndluli speaking in Zulu interrupts the proceedings."

The Commissioner then says,

"Please, I'm not asking you. Can you please shut up? I'm asking this gentleman. Just keep quiet."

The reference to the gentleman that he's asking is the other witness Mr Mthembu, who was giving evidence. So it is clear that what the Commissioner was saying to Mr Ndluli, the employee, is,

"Do not interrupt while I am questioning a witness."

It is quite true that he used the phrase "Please shut up". It might have been better for him to have said, "Please do not interrupt me. Please keep quiet." But he did make it clear, "Please, I am not asking you. Can you please shut up. Just keep quiet." It seems to me, in the context this cannot be regarded as an irregularity.

Other than that no clear basis was, in argument, put to satisfy me that there were substantial prospects of success. I may say, Mr **Ahmed S Kader**, who appeared for the applicant, Mr Ndluli, the employee, did his best with the limited amount of facts in his favour and I would like to thank him for his help to the Court. I would also like to thank Mr **Pemberton**, who appeared for the respondent and I see one of the members of his firm is here today, who I understand actually prepared the heads of argument. The heads of argument was a well prepared document and I would like to thank the legal representatives for their assistance to the Court.

I would like just to refer to one or two cases before ending off this judgment apart from the *Carephone* case. The case of *Mbatha v Lyster N.O. and Others* (2000) 7B LLR 795 (LC), a decision of BASSON J makes it clear that the Court has a discretion to condone applications which are filed outside the statutory time limits and he referred to the earlier judgment of *Queenstown Fuel Distributors CC v Labuschagne and Others* (2000)1 BLLR 45 (LAC), that, "Although condonation can be granted for late applications under section 145 of the Act, it should not be granted in the absence of compelling reasons."

I do not find in this case compelling reasons.

I would also mention that in an unreported judgment, which I happen to have had sight of, given by the Labour Appeal Court, Case DA 8.2000 in the matter between *JDG Trading (Pty) Limited t/a Russells* (Appellant) *v Whitcher N.O.* (the first respondent) *and Others*, the Labour Appeal Court, in a judgment given by GOLDSTEIN AJA makes it clear that the Court will only interfere with an arbitration award if there has been compliance with Rule 7A of the Labour Court. In the judgment GOLDSTEIN AJ says:

"In my view the first and fundamental question which arises is whether the Court *a quo* was entitled at all, on the information before it, to review and vary the order made by the first respondent."

And the judgment proceeds to show that it is essential that there be compliance with Rule 7A if there is to be an attack on the arbitrator's award.

My conclusion, therefore, is that in the exercise of my discretion I should not condone the late and defective application to set aside the award dated 22 February 1999 both on the grounds of the lateness and the defectiveness in compliance with Rule 7A, but more important because of the lack of a substantial basis for saying that there are prospects of success in attacking the reasoning of Advocate Majake. I may say, having read the typed record and also the arbitration award itself, it seems to me that it is fair to say that the Commissioner came to the correct conclusion that the dismissal of the employee was fair both substantively and procedurally and therefore confirmed the dismissal by the respondent employer of the employee. In my view it is not an appropriate case to make any award as to costs. My order, therefore, is that the application for condonation is dismissed but no order is made as to costs.

I would like to thank the legal representatives for their assistance to the Court.