

Sneller Verbatim/PJ

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: J5316/00

2001-04-26

In the matter between

DAVID BELL

Applicant

and

COMMISSIONER M S SEEDAT

1ST Respondent

THE COMMISSIONER FOR CONCILIATION

2ND Respondent

3RD Respondent

J U D G M E N T

EX TEMPORE

REVELAS, J:

- 1.This is an application for the review of a ruling made by the commissioner of the Commission for Conciliation, Mediation and Arbitration, ("the CCMA"), refusing to grant condonation for the late referral of a dismissal dispute by the applicant. The applicant seeks to review the commissioner's ruling.
- 2.
- 3.The alleged termination of the applicant's services took place on 4 April 2000. The referral to conciliation was lodged on 9 June 2000. The application is thus two months late. (61 Days beyond the 30 day period prescribed by the Labour Relations Act)

4. An application for condonation was filed by the applicant. The facts placed before the commissioner by the applicant, was that at the time he received the letter in which the third respondent advised him of the withdrawal of its offer of employment, he was in the United Kingdom where he actually resides.
5. He returned to South Africa on 29 May 2001 and instructed an attorney to attend to the dispute on his behalf and who addressed a letter to the third respondent on 1 June 2000. It is common cause that this attorney is also to blame for about one month of the total delay.
6. The applicant also pointed out to the commissioner that he immediately complained about his alleged unfair treatment to the third respondent by e.mail. The commissioner found as follows:

y did he not

return to South Africa immediately to pursue his claim against the employer? Even if he chose to remain in the United Kingdom, he could have got the forms, then sign and return them to the CCMA within the statutory period. What compounds his woes is that his attorney recedes of the matter at the end of May 2000 but only submitted the claim to the CCMA on 4 July 2000, more than a month later. An attempt to settle the dispute with the employer cannot assist the employee because the employee cannot allow the tardiness of his representative to justify his delay [*Saloojee v Minister of Community Development* 1964 [2] SA 135 [AD]; *Xayiya v African National Congress* 2000 [4] BLLR 477 [LC]; *First National Bank v CCMA* [Unreported J3001/99].

The explanation for the delay is not acceptable. The Labour Appeal Court has on many occasions held that where the reasons deemed for the delay are unacceptable, this itself would justify the refusal to grant condonation."

7. The commissioner found that the applicant did not provide a proper explanation. The commissioner, in fact, did not consider the prospect of success, notwithstanding that the applicant put before the

commissioner a supplementary affidavit in which his submissions prospects of success were contained.

8. When considering an application for condonation, commissioners of the CCMA, or any other presiding officer for that matter, exercise a discretion. In the exercise of that discretion it is that the trite factors to be considered are the following:

1. The degree of the lateness;
2. The explanation therefore;
3. The importance of the case;
4. The prospect of success.

(See: *Melane v Santam Insurance Co. Limited* 1962 (4) SA 531

(A), *Mkhize v First National Bank & Another* (1998) 11 BLCR 1141 LC, *Moodley v Umzinto North Town Board* 1998 (2) SA 188 SCA, *Potgietersrus Platinum Limited v CCMA* (1999) 20 ILJ 2679 (LC), *Transnet Limited v Hospersa & Another* (1999) 20 ILJ 1293 (LC), *Swanepoel v Albertyn* (2000) 21 ILJ 2701 (LC), *Chetty v Law Society, transvaal* 1985 (2) 750 (AD)).

9. When considering condonation applications, the weight that should be afforded to the aforesaid trite principles, vary from case to case. As was held in the Labour Appeal Court, the accumulative effect of these elements are decisive. (See: *National Union of Mineworkers v Counsel for Mineral Technology* (1999) 3 BLLR 209 (LAC)).

10. MOHAMMED, CJ. Expressed the following in *Moodley's case (supra)* at 192E-G:

".... a record was lodged some four months after the date on which it was required to be lodged in terms of Rule 5[4]. The explanation for part of this delay is not very persuasive, but what is clear is that the appellant was determined to pursue the appeal which had serious consequences for him. In my view the degree of non compliance in the circumstances of this case is not so substantial as to itself justify refusal of the application for condonation with the applicant's failure to file a

record of the proceedings timeously."

11.The aforesaid is with respect very appropriate to the facts in the matter before me.

12.It is indeed so, that the applicant did not have a hearing before his services were terminated, but on the other hand it is also correct that the applicant had not commenced working and that even if he pursued this matter against the respondent with success, he might not be awarded compensation. That is however too early to determine.

13.What is of importance is that the commissioner clearly did not consider the prospect of success, which on the papers appear to be good. In doing so, he failed to discharge his obligations in terms of the Act.

14.In these circumstances, the application for review must succeed. Consequently I make the following order:

1. The ruling of the commissioner dated 11 August 2000 under case no. GA10836 is reviewed and set aside.
2. The applicant is to be granted condonation for the referral of the dispute to the Commission for Conciliation, Mediation and Arbitration outside the time period prescribed by the Labour Relations Act;
3. The costs of this application is to be paid by the third respondent.

E. Revelas