IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG **CASE NO J4477/00**

In the matter between:

SYDNEY DINGAAN MOKOKA First Applicant

and

VANESSA PATHER NO First Respondent

P ROOPA NO Second Respondent

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION ("CCMA") Third Respondent

SOUTH AFRICAN MOTOR CORPORATION (PTY) LTD ("Samcor") Fourth Respondent

MOTOR INDUSTRY BARGAINING COUNCIL ("MIBCO") Fifth Respondent

JUDGMENT

JAMMY AJ

This is an application in terms of Section 158(1)(g) of the Labour Relations Act 1995 in

which, in his initial notice of application, the Applicant seeks orders in the following terms –

1 That the decision of the Third Respondent to refuse the Applicant's application to set down for Conciliation the dispute between the Applicant and the Fourth Respondent, which was made by the First Respondent on 5 September 2000, be reviewed and set aside; alternatively

2 That the decision of the Third Respondent, made by the Second Respondent on 26 February 2000, to dismiss the Applicant's condonation application, be reviewed and set aside;

3 That the dispute relating to the Applicant's dismissal from the Fourth Respondent be referred to the Third Respondent for Conciliation or Arbitration in terms of Section 191 of the Labour Relations Act 1995.

(There are concomitant orders sought for costs of any opposition and further or alternative relief.)

The relief so sought was augmented in a Notice of Amendment filed late in these proceedings and in terms of which an additional order is sought, condoning –

"… the delay in bringing the application to review the decision of the Third Respondent, made by the Second Respondent on 26 February 2000, to dismiss the Applicant's condonation application".

THE FACTS

The salient facts relating to this application, save for aspects to which, in that context, I shall make specific reference, are not in dispute. They may be summarised as follows.

The Applicant was employed by the Fourth Respondent until 24 August 1999, when he was dismissed for misconduct. That dismissal was challenged as being substantively and procedurally unfair and the following day, 25 August 1999, the dispute in that regard was recorded by the Applicant's Trade Union, on his behalf, in LRA Form 7.11, the prescribed procedure in terms of the Labour Relations Act of 1995 ("The Act") for the referral of a dispute to the Third Respondent **("the CCMA")**.

As a result of an internal Union administration error, that form was sent to the Dispute Resolution Centre, a division of the Fifth Respondent, the Motor Industry Bargaining Council **("MIBCO")**.

On 30 September 1999 the Dispute Resolution Centre wrote to the Union, the National Union of Metal Workers of South Africa **("NUMSA")**, as follows –

> **"Re: DISPUTE: YOURSELVES obo S MOKOKA v SAMCOR**
>
> **The above and your referral received 25/08/1999 refers.**
>
> **Kindly note that it has come to our attention that the Respondent's business falls outside the Scope of the Motor Industry.**
>
> **We suggest that you refer the matter to the relevant Bargaining Council".**

There being no other Bargaining Council with ostensible jurisdiction to deal with the matter, NUMSA, on 12 October 1999, formally referred the dispute to the CCMA.

On 15 October 1999 the CCMA wrote comprehensively to NUMSA. It is, in my view, appropriate that portions of this letter, material to this dispute, be here quoted. They are

the following –

"A Form 7.11 Referral for Conciliation, alleging that the Applicant has been unfairly dismissed, has been received in the above matter.

From the information on the Form we note that the dispute occurred more than thirty days prior to it being forwarded to us.

In terms of the LRA, Section 191(2), the Applicant is required to apply for condonation to the Commission because the matter was referred to us outside the statutory time limit of thirty days. A Condonation Committee will consider the application and make a ruling.

In terms of the CCMA guidelines and policy, the Applicant is required to set out his/her reasons for the late referral on affidavit. The Respondent (the Employer) is entitled to reply on affidavit.

The Commission, in deciding whether to grant the condonation you have applied for, will consider the following factors:

1 The degree of lateness of the referral.

2 The reason/explanation given for the lateness.

3 The prejudice each party will suffer if the application is granted/not granted

4 The prospects the Applicant has of success on the merits of the case.

In order to assist you, we attach hereto a pro-forma (model) affidavit for you to complete dealing with each of these issues. Each issue needs to be addressed by both parties …

If we do not receive an application from the Employee within fourteen days of the date of this letter, we will be unable to carry out our statutory obligations to consider condonation, and the file will be closed.

Notwithstanding that admonition, condonation by the CCMA was not sought by the Applicant until 3 December 1999. It was supported by an affidavit by certain Liza Makalela, the local organiser of the Union for the Northern Transvaal Region, who described therein how she had delegated the referral to the CCMA and to the Fourth Respondent, of the Form 7.11, to a Union administrator, certain Betty Mabusela, who had however, in error, and unknown to her, referred it to the Dispute Resolution Centre of MIBCO. She first became aware of this mistake, said Ms Makalela, when the letter from MIBCO of 30 September 1999 recording its lack of jurisdiction to deal with the matter, came to her attention. Ms Mabusela's explanation, confirmed in a supporting affidavit, was that **"she committed that mistake because she is not familiar with the companies and she thought that since SAMCOR manufactured cars, it should be falling within the scope of the Motor Bargaining Council"**.

On receipt of MIBCO's letter, Ms Makalela further deposed, she immediately faxed the 7.11 Form to the CCMA. **"As it was late already, I resolved that I will forward the reasons for the late referral at a later stage",** she concluded.

. On 26 February 2000, the Second Respondent, in a written ruling, dismissed that application. In addition to the Employer's submission that there was no justification for the administrative mistake upon which the Applicant relied, the Union had failed, he recorded, **"to deal with the important aspects of the prospects of success, the degree of lateness and the interest of the Applicant in the matter"**. Quite apart therefore from the fact that the reasons advanced were unsatisfactory, the application was defective.

. On 7 August 2000, following what the Applicant alleges were unsuccessful further

attempts to resolve the dispute, the Union's attorneys wrote to MIBCO. The sequence of events to that point was reviewed and the Council's attention was drawn for the first time to the provisions of Section 51(4) of the LRA which, it was told, **"determines that if one or more of the parties to a dispute that has been referred to a Bargaining Council do not fall within the registered scope of that Council, the Council must refer the dispute to the CCMA".** In neglecting to do so, the letter continued, the Council had failed to comply with the provisions of the LRA, thereby causing prejudice to their client and to his prospects of successfully resolving the dispute. In the circumstances, the Council was urged **"to duly refer the matter to the CCMA in order for the dispute to be resolved".**

. The Council responded by telefax the same day. In accordance with its policy, the DRC had advised the parties that it lacked the requisite jurisdiction to conciliate the dispute. A year had passed and it was not responsible for that delay, which was not attributable to it.

. The Applicant's Attorneys were then apparently informed that the reference of the dispute by the DRC to the CCMA in compliance with Section 51(4) of the Act was made on 16 August 2000 and in a letter to the CCMA dated 23 August 2000, they requested the Commission to set down the dispute for conciliation as a matter of urgency, alternatively, since it remained unresolved for a period in excess of thirty days, to set it down for arbitration. The Commission was informed that should it decline to do so, proceedings to review its refusal to refer the matter to conciliation and/or arbitration, alternatively, its original refusal of condonation, would be instituted.

. On 5 September 2000, the First Respondent, representing the Commission, wrote to the Applicant's Attorneys as follows –

> **"We acknowledge receipt of your letter dated 23 August 2000 in respect of the abovementioned matter.**
>
> **I have perused the file and regret to inform you that the CCMA has no power in terms of the**

Labour Relations Act to enrol a matter for conciliation or arbitration after condonation has been denied by a Commissioner.

Your only remedy is to take the condonation ruling on review to the Labour Court".

THE LAW

5. The application to amend the original Notice of Application by the inclusion of an order condoning the delay in the institution of these proceedings is not opposed on the papers before the Court but is cursorily dealt with in the Heads of Argument submitted by the Fourth Respondent's Attorney. No **"proper explanation"**, he submits, has been given for **"an extremely long delay"**. The delay was unreasonable and condonation should not be granted. This, in my view, is not a compelling reply, having regard to the historical development of this dispute which I have been at some pains, for the sake of clarity, to record. The refusal by the CCMA to enrol the matter either for conciliation or arbitration, was notified by letter to the Applicant's Attorneys on 5 September 2000 and it was in that letter that the First Respondent, clearly under no duty to do so, took it upon herself to assess the **"only remedy"** consequently available to the Applicant, as one of an application to this Court for the review of the original condonation ruling. That application was launched without undue further delay and, in my opinion, having regard to the intervening exchanges between the Applicant, MIBCO and the CCMA, the fact that this was not done earlier in this saga, has been adequately explained. The technically late filing of the review application is, in the circumstances of the matter, accordingly condoned.

6. Of the two alternative substantive applications for condonation made by the Applicant, logic seems to me to dictate that the second of those, the decision by the Second Respondent on 26 February 2000, under the auspices of the CCMA, to dismiss the Applicant's condonation application, should be dealt with first. The other ruling, that of the First Respondent on 5 September 2000, refusing to enrol the matter for conciliation or arbitration, is sourced directly and expressly in the earlier ruling refusing condonation. If this latter decision cannot for any reason be sustained, that, in the review context, will be

the end of the matter.

7. The Fourth Respondent's stance regarding the alleged referral of the dispute by MIBCO to the CCMA on 16 August 2000, has three elements. In the first instance, it is contended, Section 51(4) of the Act has no application. The Section reads thus –

"(4) If one or more of the parties to a dispute that has been referred to the Council do not fall within the registered scope of that Council, it must refer the dispute to the Commission".

It will follow, it is submitted, that if none of the parties falls within the registered scope of the Council, the Section cannot be applied.

8. That submission is manifestly without substance or merit. Section 51(1)(b) provides that –

"Any party to a dispute who is not a party to a Council but who falls within the registered scope of the Council may refer the dispute to the Council in writing".

Stated simply, the import of Section 51(4), read with Section 51(1)(b), is that for the Council to have jurisdiction to resolve the dispute, every party to that dispute must fall within its registered scope. If one or more of them does not, then, as the Section provides, the dispute must be referred by the Council to the Commission. It is not disputed, in the present instance, that at least one of the parties, the Fourth Respondent, does not fall within the Council's registered scope and if therefore the procedural requirements of its referral by MIBCO to the Commission were adequately complied with, the referral would have been a proper one.

9. The second aspect of the Fourth Respondent's challenge to that referral is the contention that, even if Section 51(4) has, as I have found to be the case, application in the matter, the referral must have been an **"active"** one. Support for that contention is sought in

Franken v Metal and Engineering Industries Bargaining Council and others (2000) 21

ILJ1791 (LC)

The issue in that matter concerned a referral, not by a Bargaining Council to the CCMA as in the present instance, but conversely, by the CCMA to a Bargaining Council in terms of Section 147(3)(a)(i) of the Act, the requirements of which, the Fourth Respondent contends, are analogous. What the Section implies, the Court in *Franken* held at 1793, is an **"active"** referral, apparently considering it unnecessary to define any further the meaning of that term. There was no such referral by the CCMA in that matter, it had merely declined to deal with it and the Applicant himself had later referred the dispute to the relevant Council.

. On that basis, the Fourth Respondent submits, the fact of the purported referral in terms of Section 51(4) by the Council to the Commission has not been established. There is no covering letter, nor any other substantive proof thereof on the papers before the Court.

. In rejecting that contention, the Applicant's Counsel, Advocate N H Maenetje, directed my attention to a facsimile transmission report, annexed to the Founding Affidavit, evidencing the successful transmission on 16 August 2000 of a telefax of five pages from MIBCO to the telefax number of the CCMA in Johannesburg. Mr Maenetje submitted, and I have no hesitation in accepting, that this transmission was of the LRA 7.11 Form originally and wrongly submitted to the Council, pursuant to the request by the Applicant's Attorneys to that effect in their letter to MIBCO of 7 August 2000 to which I have made earlier reference. Whatever the intended connotation of the term **"active"** in the *Franken* judgment may have been therefore, I am satisfied that, if that is indeed a requirement of the Section, it has been met and proved on a great preponderance of probability.

. If I am correct therefore that Section 51(4) of the Act has application and that, on 16 August 2000, MIBCO **"actively"** referred the dispute to the CCMA, the final question remaining for determination was whether that referral, having regard to the requirement of the Act, was in fact late and if so, whether the Second Respondent's refusal of condonation in that regard was a proper one.

. I have referred earlier to the notification by the CCMA to the Applicant of the allegedly late referral to it of his dispute with the Fourth Respondent for conciliation and its invitation to the Applicant to apply formally for condonation thereof. I have dealt also with the substance and reasons for the Second Respondent's dismissal of that application, *inter alia* for the reason that the Union representing the Applicant failed to deal with his prospects of success.

. That issue however begs the primary question of whether or not, in the context of the relevant provisions of the Act, the referral was in fact out of time and, *a fortiori*, whether an application for condonation was in fact necessary.

. The provisions of Section 51(5) of the Act are, in my view, significantly material to this determination. The sub-section reads as follows –

> **"(5) The date on which the referral in terms of sub-section (4) was received by a Council is, for all purposes, the date on which the Council referred the dispute to the Commission"**

. It is not disputed that the date on which, albeit in error, the Applicant referred his dispute to the Council, was the date following that on which he was dismissed. That, in terms of the sub-section, is therefore deemed to be the date of its referral to the CCMA. On that basis, it was not out of time. Clearly however the CCMA, in its initial rejection as late on the face of it, of the referral of the dispute to it on 12 October 1999, was not aware of the earlier erroneous referral of that dispute to MIBCO. That however was not the Second Respondent's position in dealing with the consequent application for condonation. That application was supported by the affidavits, to which I have referred, of Lisa Makalela and Betty Mabusela in which a full explanation of that incorrect reference was set out.

. It is apparent to me that, in concentrating on and emphasising what he perceived to be the defects in form of the condonation application, the Second Respondent, as he should

properly have done in his capacity as a Commissioner of the CCMA and, in that office, supposedly conversant with the provisions of the Act relevant to his function as such, failed to apply his mind thereto, and specifically, to those of Section 51. At best for him, he should reasonably have been alerted thereto by the substance of the supporting affidavits in the application before him. Had he done so, his ruling should properly have been that the application was unnecessary and that the dispute could and should be conciliated. In my view, his failure to do so constituted a gross irregularity in the face of which his ruling cannot be sustained.

That being the case, the refusal by the Third Respondent, the CCMA, to set the dispute down for conciliation in the face of the dismissal of a condonation application which I have held to have been unnecessary, can have no force or effect.

The order which, in all the circumstances of this matter I accordingly make, is the following –

The ruling made by the Second Respondent on 26 February 2000 dismissing the Applicant's condonation application is reviewed and set aside.

The Third Respondent is ordered to set down for conciliation in terms of Section 191 of the Labour Relations Act 1995 and on the earliest available date, the dispute between the Applicant and the Fourth Respondent initially referred to it under Case No GA785243.

The Fourth Respondent is ordered to pay the Applicant's costs of this Application.

_____

B M JAMMY

Acting Judge of the Labour Court

13 June 2001

Date of hearing: 30 May 2001

Date of Judgment: 13 June 2001

Representation:

ant: Advocate N H Maenetje instructed by Cheadle Thompson & Haysom Inc.

Respondent: Mr G van der Westhuizen: Macrobert Inc.