IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case No: **C1118/2001**

In the matter between:

RAHUL GRILO	Applicant
and	
THE JULIUS SOLOMON GROUP	First Respondent
THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	Second Respondent
W F MARITZ N.O.	Third Respondent

JUDGMENT

Edited

WAGLAY J:

1. The Applicant was dismissed by his employer, the First Respondent herein, on 18 July 2000. Believing his dismissal was unfair he referred same to the CCMA for conciliation. The dispute was referred to the CCMA on 2 August 2000. The CCMA set the matter down for conciliation for 8 September 2000. On 8 September 2000, and at the conciliation meeting, the First Respondent informed

the commissioner attempting to conciliate the dispute, that the dispute should have been referred to the Bargaining Council for the Textile Manufacturing Industry (this being the body which had the jurisdiction to deal with the matter).

2. On the same day (8 September 2000), the CCMA referred the dispute to the said Bargaining Council to conciliate the dispute. The Bargaining Council set the matter down for conciliation for 10 November 2000. The matter could not be resolved and a certificate to that effect was issued. The Applicant thereafter requested arbitration. The matter came before the Third Respondent, sitting as a commissioner under the auspices of the Second Respondent, for arbitration.

3. The matter was set down for 18 January 2001 on which day some evidence was led, and the matter postponed to 8 February 2001. On 8 February 2001, the First Respondent appeared with his attorney, who took an exception to the jurisdiction on the basis that the applicant had been late in referring the matter to the Bargaining Council for Conciliation, and the issue of the certificate by the Bargaining Council, in the absence of hearing an application for condonation, was invalid. According to the First Respondent, since the applicant was dismissed on 18 July 2000, and the referral for conciliation to the Bargaining Council was only made in September 2000, the Bargaining Council should not have issued a certificate of non-resolution of the dispute because the referral did not comply with section 191 of the Act. The Applicant objected to the presence of the attorney

but this objection was overruled on the grounds that a party is allowed representation to raise an "objection". The matter was then postponed to 20 March 2001, with the Applicant given an opportunity to formally reply to the objection raised.

4. On 20 March 2001, the Applicant appeared at the arbitration represented by an attorney. At this hearing, the Applicant's attorney conceded that the Applicant's referral for conciliation was late, and therefore he should apply for condonation.

5. From the unsigned document written by the third Respondent, which appears to record the train of events, he records at the end that he had been presented with a Declaration from the Bargaining Council. This, together with the concession by the Applicant that he will have to apply for condonation, led him to order that "the application be dismissed to allow [the applicant] to commence new proceedings before the Bargaining Council".

6. The Declaration referred to by the Third Respondent, is a document made under oath by one Howard Allan Hufke, who is one of the persons appointed to conciliate disputes by the relevant Bargaining Council. He was the commissioner who attempted to conciliate the dispute on 10 November 2000. He says that because of a number of confusing dates in the referral document, he believed that the referral was timeously made. He makes no mention of the fact that he knew of

the date on which Applicant was dismissed, or on what date the Applicant referred the matter to the CCMA, or that the matter arrived at the Bargaining Council through the CCMA. He then records the following in paragraph 11:

" Accordingly I am prepared to RESCIND the certificate NTX12/2000 and have the matter placed on the roll for conciliation again and to hear Applicant's application for condonation for late submissions of the referral of the dispute…"

7. After the Third Respondent made the decision recorded above, the Applicant was advised by Van Dyk (his erstwhile attorney), that Van Dyk was attempting to settle the matter. When Van Dyk failed to do this, he advised the Applicant not to proceed with his case, and the Applicant then decided to seek other assistance. The Applicant spent fruitless 5 months searching for assistance, but was unable to secure any assistance because he was not able to pay for such assistance. On 26 September 2001, the Applicant eventually found his present attorney of record who was prepared to assist him. It was also then, that he secured employment. Because of his new found employment which required him to work 6 days a week, the Applicant was unable to attend consultation on a day, other than Sunday (the Applicant being too insecure to ask time off having just secured employment after over 14 months). Furthermore an interpreter had to be secured, as the Applicant is not fluent in either English or Afrikaans. Eventually, on 22 November 2001, the Applicant launched the present application.

8. The Applicant now seeks for this Court to condone the late filing of this

application, which is to review and set aside the decision of the Third Respondent, as well as to grant the review application.

9. The application is opposed by the First Respondent, on the following grounds:

(i) that the Applicant has failed to make out a case to be granted condonation for failing to launch this application within a reasonable time;

(ii) that the Application is devoid of any merit, as the decision of the Third Respondent was a natural consequence of the recission order made by the Bargaining Council, and since the certificate of non-resolution was withdrawn (which was not attacked by the Applicant in this review), the Third Respondent was obliged to dismiss the arbitration proceedings.

10. In determining whether or not I should condone the late filing of this application, which was launched nearly 8 months after the decision sought to be reviewed was handed down, I am required to consider a number of factors. These include:

(i) the degree of delay;

(ii) the explanation therefore;

(iii) the merits of the principal dispute;

(iv) the prejudice to the party; and

(v) the importance of the matter.

11. That the delay is substantial cannot be disputed. With regard to the explanation,

while this is not totally satisfactory, it is something which has to play a role in the overall assessment on whether or not to grant condonation. Where the delay is substantial, and the explanation inadequate, unless it can be found that the merits of the matter so favour the Applicant, that refusal of condonation may result in miscarriage of justice then the Court should lean in favour of granting condonation, unless the prejudice that the other side may suffer is serious or the matter is of no consequence.

12. With regard to the merits, this matter is nothing short of tragic. Three lawyers (the arbitrator, an advocate with substantial experience in labour matters; an attorney for the Respondent who is an expert in labour matters, and the attorney representing the Applicant at the arbitration), and a person appointed to arbitrate disputes by the Bargaining Council, collectively succeeded in displaying a rather superficial reading of the Act. It appears to me that all of them read section 191 of the Act and felt confident that there were serious problems with the certificate of non - resolution issued by the Bargaining Council. Had they, or at least one of them, bothered to read Part C of Chapter VII of the Act particularly section 147(2) and (7), they would have found the following:

" (2) (a) If at any stage after a dispute has been referred to the Commission, it becomes apparent that the parties to the dispute are parties to a council, the commissioner may-

(i) refer the dispute to the council for resolution; or

(ii) …

(b)…

(3) …

(4) …

(5) …

(6) …

(7) Where the Commissioner refers the dispute in terms of this section to a person or body other than a commissioner the date of the Commission's initial receipt of the dispute will be deemed to be the date on which the Commission referred the dispute elsewhere.

13. The objection raised by the Applicant's attorney, therefore, was patently merit – less. Nonetheless, it was found to merit consideration by the Third Respondent, and the Applicant's attorneys, likewise, appeared to be caught by his own lack of knowledge of the Act. All this compounded by one Hufke of the Bargaining Council, who was quite prepared to "rescind" the certificate.

14. The submission of the First Respondent is that, if one reads paragraph 11 as a whole (referred to above), it is evident that the Bargaining Council had in fact withdrawn the certificate and since no challenge is made to the withdrawal of the certificate, the decision of the Third Respondent cannot be faulted and this Court cannot review and set aside the Third Respondent's decision.

15. I do not agree with the First Respondent's submissions as aforesaid. While it may be true that Hufke's statement may be interpreted as a decision to withdraw the certificate, it is by no means certain that he has done so. This is not the point that either of the Respondents deal with in the affidavits they have filed. I am not satisfied, on reading of the relevant paragraph by Hufke, that a decision had already been made setting aside the certificate. In the absence thereof, the Third Respondent was not entitled to "dismiss" the arbitration; he should have, as requested by Applicant's erstwhile attorney, "struck the matter from the roll" until he was given an unequivocal notice that the certificate of non - resolution had in fact been withdrawn. Had such notice been given, the Applicant would obviously have been entitled to apply to have it set aside.

16. The First Respondent's further argument that the Third Respondent's decision should not be reviewed, because it is a normal consequence of the Applicant's submission that the matter had to be referred back to the Bargaining Council for condonation for the late referral, may have been of some merit had all of the parties then present, not been under the mistaken belief that the Applicant's submission was based on that being the only route open for him to follow. Where all parties make a common mistake, why should the consequence to one of them be more drastic than to the other. I believe that the objection raised by the First Respondent at the arbitration led to a sequence of events, which, if this court fails

to intervene, will lead to a miscarriage of justice. The court also cannot stand by and see a layman who, for good reason, believes he has a valid claim, being left in oblivion while lawyers find delirium in fanciful points. It is these cases, which bring home the merits of why lawyers are not being allowed to represent parties in a number of disputes at the CCMA.

17. This, then, brings me to the issue of prejudice: while the delay would have resulted in prejudice to the First Respondent, this is, in this matter, not so severe since the First Respondent has already led substantial evidence dealing with the dismissal. Also because of what has transpired in this matter, I am satisfied that this matter is of sufficient importance that it should be allowed to proceed.

18. I am therefore satisfied that condonation for the late referral of the dispute should be granted and, for reasons already stated, the decision of the Third Respondent is liable to be reviewed and set aside.

19. With regard to the further progress of the matter, I see no reason why the matter should not be allowed to continue as it would have but for the intervention of the First Respondent's attorney.

20. With regard to costs, I see no reason why costs should not follow the result.

21. In the result, I make the following order:

(i) Condonation for the late filing of the application is granted;

(ii) The decision of the Third Respondent to "dismiss the application" is reviewed and set aside;

(iii) The Third Respondent must continue with the arbitration hearing from where it had ended on 18 January 2001; and

(iv) The First Respondent must pay the costs of this application.

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Waglay J

FOR THE APPLICANT: C.F. Haasbroek of Haasbroek Attorneys

FOR THE RESPONDENT: Mr M. Janisch instructed by C&A Friedlander Inc

Date of judgment: 8 August 2002