IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR 822/01

Heard on : 7 August 2002

Delivered on : 26 August 2002

In the matter between:

TREVOR OWEN MOULD **Applicant**

and

MR. P ROOPA N.O. **First Respondent**

THE COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION **Second Respondent**

LONMIN PLATINUM LIMITED also known as LONMIN PLATINUM and/or LONMIN PLATINUM MINES **Third Respondent**

J U D G M E N T

PILLAY , J

1. This is a review of the ruling of the first respondent Commissioner, who refused condonation of the late delivery of the referral to arbitration.

2. Whether this review should proceed in terms of section 145 or section 158(1)(g) of the Labour Relations Act No 66 of 1995 (the LRA) was an issue in these proceedings. Mr Howitz submitted that once the conciliation phase had passed, and a certificate in terms of section 135(5)(a) had been issued, the ensuing process was arbitration, irrespective of whether it was an application for condonation. A condonation application was, it was submitted, an act performed by the Commissioner in the course of his duties as an arbitrator in terms of section 145(2)(a)(ii) and had final effect.

3. Not every process that follows the issue of a certificate can be an

arbitration. The LRA differentiates between arbitration and other acts in sections 145 and 158(1)(g) respectively.

4. While processes under both sections may be adjudicative and similar, their form, content and purpose are not the same. The fact that arbitration and a ruling can have final effect does not alter the distinction between these processes. An application for condonation is not an arbitration and its outcome is not an award, but a ruling. A ruling, like any act other than an award, must be reviewed in terms of section 158(1)(g) of the LRA. (Carephone (Pty) Ltd v Marcus N.O. & Others (1998) BLLR 1093 (LAC); Kwazulu Transport (Pty) Ltd v Mnguni & Others (2001) 22 ILJ 1646 (LC); Els Transport v Du Plessis & Others (2001) 22 ILJ 1390 (LC)) I respectfully disagree with the approach in Ruijgrok v Foshini (Pty) Ltd & Another (1999) 20 ILJ 635 (LC).

5. Section 158(1)(g) however, must be interpreted as being "subject to section 145. (Carephone, above) But, it is not limited to the grounds of review in section 145. The test common to both processes is, as correctly relied upon by Mr Snider, that of justifiability and rationality. (Carephone, above; Kotze v Minister of Health 1996 (3) BCLR 417 (T)). That is the test I intend to apply in this case.

6. The applicant received a certificate of non-resolution of the dispute immediately after conciliation on the 14th June 2000. It did not bear the stamp of the CCMA, the second respondent. The applicant filed the referral to arbitration on 13th September 2000, ninety-one days after the certificate was given to him without demur. On the direction of the CCMA, the applicant applied for condonation.

7. The first ground of review was that the referral was not late and that the application for condonation was not necessary, as the certificate of non-resolution of the dispute had not been issued. The issuing of the certificate, it was submitted, included making it available to the CCMA and ensuring that it was stamped in terms of Regulation 8 (2) of the Regulations to the LRA. The receipt of a signed certificate did not amount to issuing of the certificate as it had not yet been stamped and filed with the CCMA. It is a wrong such as that contemplated in section 158(1)(a)(iii) which must be set aright by the Labour Court. So Mr Howitz submitted for the applicant.

8. Mr Snider for the respondent countered, firstly, that this point was not canvassed before the Commissioner. It was therefore new material, which could not found a valid ground of review. Secondly, there was no direct case law on the point. This court was being asked in this application to

make such law. It could not be expected of the Commissioner, therefore, to apply law that did not exist. Thirdly, even if the Commissioner erred, his ruling is not a reviewable irregularity. Fourthly, the cases relied upon by the applicant in support of this ground, are distinguishable.

9. Contrary to Mr Howitz's submission, section 158(1)(a)(iii) is not an omnibus to ride roughshod over well-established principles of the common law, labour law and practice. The Commissioner was not called upon to consider the submissions made in support of this ground and accordingly made no decision based on them. It is trite that there is nothing to review. This ground of review must therefore be dismissed.

10. In Vista University v Jones and Another (1999) 20 ILJ 939 (LC), Basson J permitted argument about jurisdiction of the CCMA when it was not canvassed in affidavits but raised for the first time in supplementary heads of argument. It is hardly support for Mr Horwitz's proposition that a party can on review raise new material not presented at the original tribunal.

11. The applicant has also not established that the CCMA and the Commissioner committed a wrong such as that contemplated in section 158 (1) (a)(iii), by calling for and ruling on the application for condonation. Once a certificate is completed and signed by the Commissioner, three

distinct steps are followed: the issuing, service and filing of the certificate. The issuing of the certificate does not include its service, filing or stamping. It is the act which simply makes available the signed certificate to the party entitled to receive it. (Freestate Buying Association Ltd t/a Alpha Pharm v Saccawu And Another (1999) 3 BLLR 223 (LC)) A less formal approach than that applied in Chasen v Ritter 1992 (4) SA 323 (SE) was followed in the Protea Assurance Co. Ltd v Vinger 1970 (4) SA 663 (O) where it was held that the issue of summons merely meant to send or hand out, publish or put in circulation; the official stamp was not required. Nothing in section 135(5) invokes the restrictive interpretation that Mr Howitz seeks to place on it. (Queenstown Fuel Distributors CC v Labuschagne N.O & Others (2000) 1 BLLR 45 (LAC)

12. Whether the certificate is made available before or after it is filed in the CCMA, is immaterial. The issuing of the certificate immediately after the conciliation is efficient. To require the further steps of filing and stamping the certificate as prerequisites for issuing it could result in delay and costs for the CCMA and the parties.

13. If Mr Howitz's approach were to be followed, parties may not know when a certificate is issued. They may only become aware of the filing and stamping of the certificate after these steps are taken, by which time

prescription could already have started to run.

14. Whilst Mr Howitz's submission seeks to advance the cause of his individual client, it is short-sighted as it does not benefit the vast majority of litigants who depend on the certificate being issued expeditiously after conciliation.

15. Mr Howitz's submissions therefore, about sections 135(5) and 158(1)(a)(iii), are not supported by a proper construction of these sections, the case law and the requirements of efficient dispute resolution. The proposition that condonation was not required at all, must therefore fail for the further reason that the certificate was properly issued on 14 June 2000.

16. The second ground of review was that the Commissioner committed misconduct as an arbitrator in that, he relied upon inadmissable evidence in assessing the applicant's prospects of success on substantive issues. The respondent's representative, C.A.J Potgieter, was not authorised by resolution to depose to an answering affidavit. A signed resolution passed by the directors of Western Platinum Limited subsequent to the deposition could not, it was submitted, cure the defect.

17. Somewhat loftily, considering that the applicant's own non-performance

within time limits triggered this application, Mr Howitz persisted that when an act has to be done within a fixed time, performance thereof by an unauthorised agent cannot be ratified after the lapse of such fixed time, to the prejudice of another who has acquired some right or advantage from non-performance within the fixed time. The right he referred to was that of having the condonation application heard on an unopposed basis.

18. The time limit for filing the answering affidavit had been fixed by the Commissioner. Despite the Commissioner having given directions about the filing of further affidavits, the respondent deviated from these directions by filing its affidavit out of time and by filing further affidavits, which were not authorised. The Commissioner did not permit the applicant to respond to the unauthorised affidavit, nor did he deal in any way with the third respondent's non-compliance with the time limits stipulated in his directions. So it was submitted for the applicant.

19. At the condonation application hearing, the applicant objected to Potgieter's authority to depose to the answering affidavit as the resolution was unsigned. This was not vigorously pursued in its pleadings in this application where he indicated that he neither admitted nor denied Potgieter's authority but put the third respondent to the proof thereof. Despite this, Mr Howitz persisted in arguing this ground of objection.

20. The third respondent had handed to the Commissioner a signed resolution at the hearing. It was proof of the authority that the applicant sought. The third respondent explained the logistical difficulties it had experienced in delivering a signed resolution simultaneously with its answering affidavit. The applicant ought to have let the matter rest there. Instead, Mr Howitz now submits that the resolution could not validly operate retrospectively to ratify the answering affidavit.

21. The applicant acquired no vested or substantive right to have his application for condonation heard unopposed by the Commissioner. The general proposition is stated thus in Finbro Furnishers (Pty) Ltd v Peimer 1935 CPD 378 at 380:

> " When an act has to be done within a fixed time, performance of that act by an unauthorised agent cannot be ratified by the principal after the lapse of such fixed time to the prejudice of another who has acquired some right or advantage from non-performance within the fixed time."

22. But, Goldstone J in Baeck & Co. v Van Zummeren 1982 (2) SA 112 (W) disagreed with Kannemeyer J in South African Milling Co (Pty) Ltd v Reddy 1980 (3) SA 431 (SE) by holding that ratification of an unauthorised

act operated retrospectively to cure the original lack of authority. Harms JA in Smith v Kwanonqubela Town Council 1999 (4) SA 947 (SCA) agreed with Conradie J in Merlin Gerin (Pty) Ltd v All Current and Drive Centre (Pty) Ltd 1994 (1) SA 659 (C), by accepting that a litigant does not have a right to prevent the other party from rectifying a procedural defect. Contrary to Mr Howitz's submission, the Smith case is hardly support for his proposition.

23. Irrespective of whether an application for condonation is opposed or unopposed, the Commissioner exercises an independent discretion as to whether to grant or refuse it. The Commissioner could have dismissed the application on the applicant's version alone as he was not satisfied with the explanation for the delay.

24. Mr Potgieter was the human resources manager. He had personal knowledge of facts material to the condonation application. These two factors enabled him to adduce evidence to the Commissioner. His deposition was an ordinary act, authority for which was implied from his status with the third respondent. The resolution was merely corroboration of his authority. (Glofinco v Absa Bank Ltd T/A United Bank 2001 (2) SA 1048 (W)). Even if I am wrong about this, retrospective ratification of the authority of a representative is permissible. (Kritzinger v Newcastle Local

Transitional Council 2000 (1) SA 345 (N)); National Co-Op Dairies Ltd v Smith 1996 (2) SA 717 (N)).

25. The third ground of review was that the Commissioner admitted the allegations of misconduct in the answering affidavit which were hearsay as they were not corroborated by affidavits of the complainants. The contents of the answering affidavit influenced the Commissioner to find that the prospects of success on the substantive issues depended on allegations of misconduct. If the Commissioner had struck out the third respondent's answering affidavit, either because it was not authorized by resolution, or that it was delivered late, or because it contained hearsay evidence, then the Commissioner would have had only the evidence of the applicant about the substantive fairness of the dismissal. So it was submitted.

26. Mr Potgieter testified about evidence that was led in his presence at the disciplinary enquiry. That is direct evidence of what transpired at the enquiry. He did not purport to be a witness to the actual acts of misconduct. By insisting that the third respondent ought to have delivered affidavits by the complainants and witnesses to the misconduct it is obvious that Mr Howitz fails to distinguish between the relevance of the evidence of the enquiry and that of the misconduct.

27. In my view the underlying reason for the applicant objecting to the admissibility of the answering affidavit was because it provided credible evidence of his misconduct.

28. Mr Howitz relied on Van Dyk v Autonet (A Division Of Transnet Limited) 2000 (21) ILJ 2484 (LC), as providing the armour against disclosure of the applicant's defence.

29. The requirement of establishing prospects of success was confirmed in Melane v Santam Insurance Co. Ltd. 1965 (2) 135 AD thus:

"In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case……if there are no prospects of success there would be no point in granting condonation….. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits."

30. The fact that the onus of proving the fairness of the dismissal rests on the employer, does not relieve an applicant in a condonation application of the obligation of proving that it has prospects of success. It means that the test for prospects of success will be applied in the context of a dismissal

dispute where the onus of proving the fairness of the dismissal rests ultimately on the respondent employer. The test is not that it will, but could succeed. It is a preliminary and not final assessment of the merits of an applicant's case.

31. Van Dyk above, was an application for condonation. Wagly J said the following:

"[15] Third respondent's further submission is that the application should be refused because applicant has failed to satisfy this court that it has any prospects of success. In matters such as this, which relate to unfair dismissal all that the applicant is required to satisfy this court about is that he was dismissed and that the dismissal was unfair. The onus of proving the fairness of a dismissal is upon the respondent. In such an event to require the applicant to allege that he has good prospects of success is in effect requiring of him to anticipate what evidence the respondent may come up with and deal with that - this cannot be tenable. Had the applicant in a condonation application been a 'defendant' then consideration of prospects of success would no doubt play a meaningful role but I do not consider the factor relating to prospects of success as a deciding factor save that an applicant in a matter such as this must satisfy this court that he was in fact dismissed and that the dismissal was based on such grounds over which the court has jurisdiction and that he believes that the dismissal was unfair. The fact that the applicant was in fact dismissed, is not disputed by the respondent,

the fact that this court has jurisdiction over the dispute is not in issue. The belief by the applicant that the dismissal was unfair is self evident, to expect anymore of an applicant is as stated earlier to expect the applicant to anticipate the respondent's case which I believe would be placing a burden on an applicant which is not required by the LRA." (my underlining)

32. The learned judge expressed a similar view in Jamela v Accord (2000) 5 LTD 654 (LC). He accepts that an applicant has to satisfy two requirements:

a. that he was dismissed;

b. that the dismissal was unfair.

33. I imply from this that the learned Judge accepts that the requirement imposed by the Appellate Division in Melane v Santam above, about proof of the prospects of success, is not dispensed with in an application for condonation by a dismissed employee. His further statement that the onus of proving the fairness of a dismissal is upon the respondent must be a reference to the onus when the substantive dispute is ultimately adjudicated.

34. My learned brother's judgment cannot be interpreted as a licence to remain silent about the prospects of success. The facts leading to the

dismissal and the reasons why the applicant alleges that the dismissal was unfair should be pleaded in such detail as to enable the court to assess whether, *prima facie,* there are prospects of success. An applicant must provide in an application for condonation such information about the prospects of success that, if proved in the main action, it would be entitled to relief. Thus, if an applicant can anticipate the opposition's evidence it must plead it in its founding affidavits. If it cannot, then it must deal with it in reply. This approach does not shift the onus of proving the fairness of the dismissal away from a respondent employer.

35. Human nature is such that a party who genuinely believes that it has been unfairly treated, would be inclined to vent its dissatisfaction as often as it can. Litigants who fail to plead adequately or at all the prospects of success, may cause the Court to draw an adverse inference.

36. The applicant was aware of the charges against him. The facts underpinning those charges emerged at the disciplinary enquiry. He ought to have anticipated that the third respondent might plead its version fully. His version should have been set out in sufficient detail in his founding affidavit. If he did not anticipate the contents of the answering affidavit, then he should have dealt with the allegations fully in his reply.

37. The charges included sexual harassment and behaviour not befitting a senior employee. Detailed evidence of the complainants and of the corroboratory witnesses was led at the enquiry. They testified *inter alia* that : The applicant left love notes on his assistant's computer in full view of colleagues. This was humiliating. His conversations often centred around sex, which the assistant found disconcerting. He persisted in his conduct despite her protests. She sought a transfer from her workplace. In the presence of others, he made embarrassing remarks about her body and said that if she slept with him, she would never sleep with anyone else again. Waitresses at the Country Restaurant also testified about his rude and aggressive behaviour.

38. All of this was pleaded in the application for condonation and the review. In his founding affidavit, the applicant testified that he had indicated to a secretary in his office that he was attracted to her and that he wanted to ask her out. He had audibly expressed his dissatisfaction with the service at the restaurant, which was run by an independent owner on premises rented from the third respondent. In reply, he simply denied all the allegations and put the third respondent to the proof thereof.

39. More than a bare denial was required of the applicant. The applicant chose not to disclose his defence fully, either because he had none, or

feared that he might be saddled with a version on oath that he might want to change later. Either way, he obviously did not inspire the Commissioner as a convincing and credible witness.

40. The applicants fourth ground of review was that the Commissioner allowed the third respondent to deliver a replying affidavit dated the 19th April 2001. The Commissioner had directed the third respondent to file only a supplementary affidavit and the applicant to respond thereto. So it was submitted.

41. The third respondent's supplementary affidavit was an explanation of its failure to submit a signed resolution with its answering affidavit. The applicant's response thereto raised matters other than those relating to the unsigned resolution. If any affidavit should have been disregarded, it was the applicant's answering affidavit in so far as it dealt with matters other than the resolution.

42. Mr Howitz called on the Commissioner to disregard the replying affidavit. He did not ask for a further opportunity to respond thereto. The Commissioner had a discretion about the procedure to be followed in the circumstances. It is evident that he referred to it without ruling on its admissibility. However, the Commissioner did not rely on it for accepting

the signed resolution *ex post facto.* About that, the Commissioner reasoned thus:

"The above tug-of war between the warring parties, or their attorneys, illustrates the over technical legal approach adopted by the legal profession, and further illustrates their ignorance of the recently promulgated 'RULES REGULATING THE PRACTICE AND PROCEDURE FOR RESOLVING DISPUTES THROUGH CONCILIATION AND AT ARBITRATION PROCEEDINGS,' which largely regulate the issues they have raised. Firstly, it is not only the practice of the Labour Court, but also the practice in all our High Courts, to allow for the production of an original resolution at the commencement of a matter before it, and does not amount to an irregularity as such.

I accept the distinction between the South West Africa National Union matter from the present one on the argument presented by the third respondent.

The parties have ignored two further aspects of the above-mentioned rules, namely my powers to join parties or substitute parties in terms of Rule 12 and that I can accept a simple written statement in terms of Rule 19.6 of the said rules in place of affidavits in condonation applications.

That being the case, the points raised by the parties *(sic)* becomes somewhat secondary, and I believe it would be fair and equitable to disregard them and to

make a finding on the matter before me, namely the condonation application itself."

43. Quite deftly, the Commissioner cut through the peripheral and procedural issues and proceeded to deal with the substance of the dispute. As the applicant introduced the case of South West Africa National Union v Tsozongoro & Others 1985 (1) 376 (SWA), the Commissioner referred to it by distinguishing it, correctly in my view, from the dispute before him. For the substance of the dispute, i.e. whether condonation should be granted, the Commissioner relied exclusively on the material contained in the founding, opposing and replying affidavits filed before the hearing of the condonation application. The facts and submissions supporting the applicant and third respondent are manifest at paragraphs 3 and 4 respectively of the award.

44. Mr Howitz submitted that the Commissioner ought to have found that there was procedural and substantive unfairness in the dismissal of the applicant. The Commissioner, he said, failed to deal at all with procedural fairness.

45. The award manifests that the Commissioner dispensed with the prospects of success thus:

"Turning my attention to Mr Moulds prospects of succeeding should I grant him condonation for the late filing of his referral, I remain unconvinced that he would succeed if I should decide to do so. His simplistic version, challenged by the other party in some detail, is not taken up by him in any meaningful manner, which would leave the allegations against him undisputed and of such a nature, that I do not believe he would succeed in proving his dismissal to be unfair."

46. This reasoning is entirely consistent with the material before the Commissioner at arbitration. The applicant chose not to take the Commissioner into his confidence and disclose his defence fully either in his founding affidavit or in his reply. Once the incriminating allegations were detailed in the answering affidavit, he was compelled to give some explanation, which, if proved at arbitration, would have entitled him to relief. No other reasonable inference could be drawn from his inadequate response but that he did not have a valid defence. Substantively therefore, the Commissioner correctly inferred that the dismissal would have been justified at trial.

47. The nature of the allegations were such that they over-rode any relief for procedural unfairness. The fact that the applicant had less than one month's service, could also have counted against the granting of

compensation. This reasoning can be inferred from the award even though the Commissioner did not distinguish explicitly between substantive and procedural fairness. From his notes, it appears that he was alive to the complaint of procedural unfairness.

48. The grounds of procedural unfairness, were pleaded by the applicant thus:

> "The disciplinary proceedings at which I was arraigned were procedurally flawed since the Chairman failed to follow the Employer's Disciplinary Code, read out the charges in the presence of witnesses later called, had no jurisdiction to entertain the charges relating to the alleged incidents at THE COUNTRY COTTAGE RESTAURANT, failed to halt the proceedings when it appeared that my immediate superior, Mr M GCABO who was implicated in the said incidents refused to give evidence on my behalf or had been influenced by the employer not to give evidence on my behalf alternatively since he failed to issue a managerial order to the said GCABO to give evidence and the said GCABO'S evidence was relevant and essential and also since the Chairman made comments at an early stage in the proceedings which indicated that the result of the hearing was pre-ordained and failed to hold a separate enquiry into sanction."

49. Firstly, no one was prejudiced by the charges not being read out in the presence of each witness. Secondly, it is trite law that the third respondent had jurisdiction in respect of any work–related dispute even if it arose

outside the workplace. (Van Zyl v Duhva Opencast Services (Edus) Bpk 1988 (9) ILJ 905). Certain acts of misconduct were committed in the restaurant situated in a village for which the applicant had responsibility as estates manager. It was also frequented by the third respondent's employees. These facts were not disclosed by the applicant. Thirdly, the third respondent had no authority to compel anyone to testify for the applicant. As Mr M Gcabo elected not to testify for the applicant, there was nothing that the third respondent could do. Fourthly, precisely what comments the Chairman made is not evident from the record. That "the results of the hearing was pre-ordained"*(sic)*, was a conclusion that the applicant came to, without pleading the facts on which he relied therefor. Fifthly, it is trite law and practice in industrial relations that, unlike a criminal trial, a separate enquiry into sanction is not a pre-requisite for ensuring procedural fairness.

50. From the aforegoing, it is clear that none of the procedural grounds had any prospects of success. They were made frivolously and Mr Howitz as an attorney ought to have advised the applicant accordingly.

51. The Commissioner acknowledged that the period of delay of about 15 hours was "minimal." The reason for the delay was found to be "not satisfactory" because:

"Ninety days is a long time in which to consider whether one wants to proceed to arbitration after a failed attempt to conciliate a matter, and to wait until the end of such period before taking any action is wholly unsatisfactory. In addition, if Mr Mould or Mr Howitz had immediately acted on the 11th September 2000, when the referral to arbitration was signed, and had referred the matter to arbitration, they would have no problems in respect of the late filing of this referral. No explanation for such failure has been tendered, except that the period was miscalculated, which is contrary to the 90 day limitation."

52. On the basis of this finding alone, the Commissioner could have dismissed the application (Chetty v Law Society Tvl 1985 (2) SA 756 A at 765 E-F). Having completed the form timeously on 11th September 2000, there was no explanation as to why it was not delivered that day and why the applicant had delayed its delivery. This reasoning cannot be faulted.

53. The fact that the applicant, Mr Howitz and the CCMA were separated by long distances, was no excuse as the applicant had access to telecommunication facilities.

54. Employed as he was as a manager, the applicant ought to have experienced no difficulty in completing the referral to arbitration; he chose to be represented by an attorney. He accepted the latter's advice that the

referral should be drafted in the form of a combined summons. These choices cannot be allowed to prejudice the third respondent.

55. The Commissioner made no finding to the effect that the negligence of Mr Howitz caused the delay because that was not pleaded in the application for condonation. In this regard, Mr Howitz and the applicant were less than frank with the Commissioner.

56. A miscalculation by the applicant was, in the discretion exercised by the Commissioner, unacceptable in the circumstances.

57. The condonation application failed therefore, on two legs i.e. the explanation for the delay and the lack of prospects of success.

58. I turn to the issue of costs. The kind of issues that the applicant pursued is an indication of his belief in the strength or otherwise of his case. In this application and in the application for condonation, the applicant and his attorney were preoccupied with technical, formal and procedural issues. They studiously avoided having to deal with the substance of the dismissal which, ultimately, is the heart of the matter. They must have realised therefore that the applicant had little prospects of success.

59. Mr Horwitz raised issues that were long settled in labour jurisprudence and referred the Court to inappropriate authority. He ignored Rule 18 of the Rules of the Labour Court which require “concise heads of argument on the main points” to be argued to be delivered.

60. The applicant’s plea that he should not be saddled with the costs if unsuccessful must be rejected for these reasons.

The application for review is dismissed with costs.

Pillay D, J