

IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

NOT REPORTABLE

CASE NO: **D335/02**

DATE HEARD: 2002/10/21

DATE DELIVERED: _____

2002/10/21

In the matter between:

SOUTHERN SUN HOTEL INTERESTS
(PTY)LTD T/A BREAKERS RESORT

Applicant

and

COMMISSIONER RAJENDRA SHANKER
Respondent

First

COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION
Respondent

Second

JOHNNY BASDEO MANGAROO
Respondent

Third

JUDGMENT DELIVERED BY
THE HONOURABLE MS JUSTICE PILLAY
ON 21 OCTOBER 2002

ON BEHALF OF APPLICANT
ALEXANDER
DENEYS REITZ INC.

MR M

ON BEHALF OF RESPONDENT

REDDY

MR S V REDDY
ATTORNEY JAY

TRANSCRIBER
SNELLER RECORDINGS (PROPRIETARY) LTD - DURBAN
JUDGMENT

PILLAY J

- [1] This is an application to review and set aside the ruling of the first respondent Commissioner, who granted condonation for the late filing of the third respondent's referral for conciliation.
- [2] The first difficulty I have with the application is that I have only a transcript of the notes of the Commissioner to proceed with to determine what submissions were made at the hearing before the Commission. No mechanical recording was kept of the proceedings.
- [3] The second difficulty I have is that the Commissioner's ruling does not

throw any better light on the matter. It is a "cut and paste" decision similar to a number of this Commissioner's previous rulings in other matters. I have raised this point previously and I repeat my dissatisfaction with Commissioners making awards which do not manifest reasons.

[4] The third difficulty arises because the third respondent has not spelt out the grounds on which it resists this application, such grounds being apparently based on evidence of what transpired at the hearing before the Commissioner. It is obviously inappropriate for the parties to tender evidence from the Bar about what happened at the hearing before the Commissioner.

[5] However, notwithstanding these difficulties, the record of the condonation hearing is sufficient for me to determine the matter finally.

[6] The material facts are that the applicant made the first application for condonation on the 6th August 2001. That application was ruled to be defective on the 13th September 2001 as it had not been signed by the applicant.

[7] The employee alleges that he only became aware of the ruling on the first application for condonation on or about 17th October 2001 and relodged his application on the 24th October 2001. It is not clear from the employee's affidavit whether he became aware of the ruling on the first application on the day it was made, but was advised in writing of it only on the 17th October, or whether he became aware of the ruling when he received the written communication. Nevertheless, I give the employee the benefit of the doubt on that issue and accept, for the purposes of this case, that he became aware on the 17th October 2001.

[8] The application for condonation dismally lacked material information. The degree of lateness was not filled in on the prescribed form. The reason for the lateness was given as:

"I was dismissed on 8 June 2001. I was informed of the internal appeal procedure of the company. My rights to declare a dispute within 30 days were not told to me by the company. As of date I have not received outcome of appeal. Company is deliberately delaying the process. As per disciplinary code there are 1st and 2nd appeal. Still awaiting outcome of second appeal."

[9] The employee did not explain how and when he became aware of his

rights to declare a dispute. He obviously elected to proceed with a referral before the second appeal had been finalised or before he had been informed of the decision of the second appeal.

[10] He describes his prospects of success as follows:

"Dismissal is both procedurally and substantively unfair. Presiding officer impartial. Case was prejudged. Substantively company failed to show good cause for dismissal and failed to prove the allegations."

[11] And the prejudice that he suffered, he said:

"For the above reasons as well as I was not informed of my rights at the time of my dismissal. Company deliberately stalled the whole process of appealing."

[12] I accept that the form provides for a brief explanation on the specific headings that go to determining whether condonation should be granted. However, once an answering affidavit was filed then the employee was obliged to provide a detailed response and an explanation to the allegations made in the answering affidavit.

[13] There was no reply to the answering affidavit. Material issues that remain unanswered by the employee include details of the allegations of misconduct against him; the fact that he did not have a reasonable

explanation for the delay, the total delay according to the employer being 114 days; the prospects of success and the prejudice that he would suffer if the application for condonation was not granted. More specifically, he did not disclose that he had found employment since his dismissal.

[14] In the absence of a reply, the employer's version, in so far as it remained uncontested by the employee, must prevail.

[15] On that version, the Commissioner ought not to have granted condonation. The material allegations are to be found at paragraph 25.4.1 to 25.4.3 of the answering affidavit at page 23 of the bundle of the record.

[16] The Commissioner found that the degree of lateness of 109 days was significant but accepted that the explanation therefor was reasonable. For the purposes of this case, I will give the Commissioner the benefit of the doubt in finding that the explanation for the delay was reasonable in so far as the date on which the employee became aware of the first ruling was established as the 17th October 2001 and not the 13th September 2001 when the ruling was made.

[17] However, his finding that the degree of fault on the employee's part in submitting the referral late is "low" is unsubstantiated. The reason for the filing of the second application was because the first application had not been signed. The defect in that application was material because it is quite clear that the applicant had to sign the application for condonation.

[18] Even in this regard I will yield to the Commissioner's finding and assume that this was a human error on the part of the employee that should be condoned.

[19] He sets out, however, no grounds for finding that the prejudice was not significantly different and the prospects of success remain in dispute. He did not deal with the fact that the applicant had already found alternative employment. The fact that the employer alleged, without any opposition from the employee, that there was no longer a position for him in the company or that the employer would be inconvenienced if it were to be put to its defence of the dismissal.

[20] The most significant defect in the ruling is that the absence of prospects of success were spelt out at paragraphs 25.4.1 to 25.4.3 of the answering

affidavit. In the absence of an explanation by way of a reply on affidavit from the employee, the Commissioner should have found in favour of the employer. The Commissioner made no reference to the fact that there was no replying affidavit filed by the employee.

[21] In those circumstances, the ruling must be set aside.

[22] The order that I make is as follows:

- (a) I grant an order in terms of paragraphs 1, 2 and 3 of the notice of motion.
- (b) I direct the Registrar to bring to the attention of the Senior Convening Commissioner of the CCMA, KwaZulu-Natal and to the second respondent the criticisms I have raised in this matter about the second respondent's failure to provide an adequate ruling with reasons.

JUDGE D PILLAY
