

IN THE LABOUR COURT OF SOUTH AFRICA

SITTING IN DURBAN

REPORTABLE

D1735/01

2002/10/23

23/10/02

2

CASE _____ NO _____

DATE

HEARD: 23/10/02

DELIVERED:

REVISED:15/11/0

In the matter between:

COATES BROTHERS (SA) LTD

(Applicant)

and

RAJENDRA SHANKER

(1st Respondent)

CCMA

(2nd Respondent)

CEPPWAWU

(3rd Respondent)

RATHLALL
(4th Respondent)

DEONARANE

SINGH

**JUDGMENT DELIVERED BY
THE HONOURABLE MS JUSTICE PILLAY**

TRANSCRIBER
SNELLER RECORDINGS (PROPRIETARY) LTD - DURBAN
JUDGMENT

PILLAY J

[1] This is yet another review of a condonation ruling by the first respondent Commissioner which is best described as "a cut and paste" decision. It manifests no reasoning, no evidence that he applied his mind to the facts supporting the conclusion or the findings that he made. It is simply a list of findings, unsupported by facts.

[2] The ruling reads:

"Reasons for ruling:

The applicant has shown good cause in terms of section 191(2) of the Labour Relations Act 1995, in that:

- *The application is 68 days late;*
- *The degree of fault in submitting the referral late is low;*
- *The applicant has provided a reasonable explanation for the delay;*
- *The prejudice to the parties is not significantly different;*
- *The applicant may [have] prospects of success in the main dispute;*

The application for condonation is granted."

[3] Substantially similar wording has been used by the same Commissioner in another matter that I heard earlier this week, and on two previous occasions.

[4] Commissioners must realise that in so far as the record of a hearing is deficient, the Court relies on their reasoning as manifest in the ruling or award.

[5] The parties are also entitled to the constitutionally entrenched right to administrative justice, which includes the right to have reasons for administrative action.

[6] The failure to provide reasons for his findings that support his ruling are sufficient grounds for setting aside the ruling. However, there are sufficient common cause facts before me to determine the matter finally.

[7] On the prospects of success on the merits, it is common cause that the evidence against the applicant was entirely circumstantial.

[8] The third respondent's grounds for challenging his dismissal was the use of a polygraph test which the applicant alleges was not the basis for dismissing him. Because he did not in the referral form object to his dismissal on the ground that it was based on circumstantial evidence, it would not have precluded arbitration on all issues relating to his dismissal, including the fact that it was based on circumstantial evidence. It is also a highly technical stance by the applicant.

[9] The applicant bears the *onus* of proving the fairness of the dismissal and would have had to lead evidence, circumstantial or otherwise, to support its decision. One way or the other, the Arbitrator would have to consider that evidence to determine the merits.

[10] As the evidence is purely circumstantial there are some prospects of success on the merits. Mr Alexander relied on a number of authorities that say that if there is no or an inadequate explanation for the delay, the Court need not enquire into the prospects of success. *NUM v Council for Mineral Technology* (1999) 3 BLLR 209 (LAC), *Waverley*

Blankets Limited v Ndimma & Others (1999) 20 ILJ 2564 (LAC),
Chetty v Law Society Transvaal 1985 (2) SA 756 (A) at 756 A-
C, *National Union of Mineworkers & Others v Western Holdings*
Gold Mine (1994) 15 ILJ 610 (LAC).

[12] Ms Reddy requests that I follow the decision in *Melane v Santam Insurance Company Limited* 1962 (4) S.A 531 (A), in which it was held, *inter alia*, that if there are some prospects of success condonation should be granted. Whichever view is followed will depend on the facts of each case.

[13] I accept for the purposes of the findings that I make in this case that the explanation for certain periods of the delay was non-existent, inadequate and unacceptable.

[14] However, in electing to consider the prospects of success on the merits, I took into account the following:

- (a) There were two referrals to conciliate to the CCMA;
- (b) The first referral to the CCMA was made timeously;
- (c) It was defective for want of a signature.
- (d) There is no explanation why the applicant insisted on the application being signed or why it did not ask that the defect

be remedied when the matter was set down on 30 July 2001 or at any time before that. The defect was formal and could have been cured by a common sense approach to dispute resolution.

- (e) I am loath to allow a procedural requirement to stand in the way of the substantive determination of the constitutionally enforced right to fair labour practices.

(15) In the circumstances, I elect to follow the decision in *Melane v Santam (supra)* in this case.

(16) The order I make is as follows:

- (1) The ruling is set aside for want of reasons therefor.
- (2) The late referral for conciliation to the CCMA is condoned.
- (3) There is no order as to costs.

JUDGE D PILLAY

**ON BEHALF OF APPLICANT : MR. M.
ALEXANDER**

ON BEHALF OF RESPONDENT : MS. S. REDDY