IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO. J2116/00

In the matter between :

SOUTH AFRICAN BROADCSTING CORPORATION **Applicant**

and

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **1st Respondent**

RUSSELL MOLETSANE N.O. **2nd Respondent**

DUMISA QUPE **3rd Respondent**

SIMON MAGASELA **4th Respondent**

NALEDI RAMABOA **5th Respondent**

SINA MAHLASELA **6th Respondent**

JUDGMENT

MOERANE AJ:

1. This is an application in terms of section 158(1)(g) of the Labour Relations Act No. 66 of 1995 ("the Act"), to review and set aside the ruling by the 2nd Respondent, ("the Commissioner") given on 28 April 2000, in terms of which he condoned the late referral of the dismissal dispute by the 3rd to 6th Respondents to the 1st Respondent, ("the Commission for Conciliation, Mediation and Arbitration" or "the CCMA") .

2. It is common cause that the 3rd to 6th Respondents were dismissed with effect from 31 July 1997, in pursuance of a restructuring exercise by the Applicant. It is also common cause that the dispute

was referred to the 1st Respondent by the 3rd Respondent on 9 July 1998, the 6th Respondent on 8 July 1998 and by the 4th and 5th Respondents on 5 May 1999, but possibly in July 1998.

3. The Applicant has brought the review application on the following grounds :

3.1 with regard to the 3rd to 6th Respondents – their referrals were so out of time, the explanation for the delay so weak and the prejudice to the Applicant so grave that the 2nd Respondent's decision to grant condonation in the circumstances amounts to misconduct, alternatively, he exceeded his power in granting such condonation.

3.2 with regard to the 4th and 5th Respondents – both were members of a union with which the Applicant had a collective agreement that required all dismissals to be referred to arbitration. Consequently, the 1st Respondent lacked jurisdiction to conciliate and arbitrate their dispute; and, therefore, the 2nd Respondent should have made such a ruling.

4. The application was opposed by the 3rd to 6th Respondents.

5. It will be convenient to begin with a consideration of the second ground of review.

6. It is common cause that, at the time of their dismissal, the 4th and 5th Respondents were members of the Media Workers' Association of South Africa ("MWASA"); there was a collective agreement between the Applicant and MWASA, which regulated the procedure to be adopted in disputes involving alleged unfair dismissals, and the said agreement was still in operation.

7. In terms of Clause 10 of the said agreement, a dispute arising from dismissal must be referred to private arbitration under the auspices of the Independent Mediation Service of South Africa ("IMSSA"). There is a dispute between the parties whether or not the dispute was referred to private arbitration in terms of the said

agreement. What is clear, however, is that if it was so referred, the arbitration, for reasons which are not explained in the papers, was not proceeded with and no decision was ever made by any arbitrator in terms of the said agreement.

8. In terms of section 23 of the Act, a collective agreement binds the parties to the agreement and each party to the agreement and the members of every other party to the agreement, in so far as the provisions are applicable between them. Collective agreements underpin the very system of collective bargaining and every effort should be made to protect them. In the matter of ***Building Construction & Allied Workers' Union & Others v Masterbuilt CC*** **1987 (8) 670 ILJ (IC) at 677 B – I** Landman AM, as he then was, said the following :

"***The fact of the matter is that within a certain closed community consisting of employer, the union and employees/union members, the rules between the employer and organised labour are regarded as having binding authority. The approach which will be adopted is one which is based on the recognition by this court that recognition agreements provide rules which are acknowledged by the parties to a particular relationship to be binding upon themselves. The parties legitimately expect that the rules will be observed by all the parties concerned. It is of the utmost importance for the court to give effect to the rules of such a procedural agreement because in this way the court will be fostering the concept of collective bargaining and the related concept of self-government."***

Although these words were spoken in relation to the 1956 Labour Relations Act, in my view they apply with equal force to the current Act, and I am in respectful agreement therewith.

9. It is incumbent on any commissioner acting under the auspices of the CCMA to ascertain whether or not he or she has the jurisdiction to hear a matter brought before him or her. It is no defence to a challenge based on his lack of jurisdiction to say that the parties requested him to adopt a procedurally irregular step or condoned or connived in it, as the 2nd Respondent *in hoc casu* seems to be saying. I find that the 2nd Respondent did not at all consider the question whether or not he had the jurisdiction to hear this matter – in fact, he deliberately refrained from considering it. It is my considered view that the 4th and 5th Respondents were bound by the dispute resolution

provisions contained in the said collective agreement and that they did not comply therewith. Consequently, I find that the 2nd Respondent did not have the jurisdiction to hear the applications of these two Respondents. In my judgment, the 2nd Respondent's conduct of condoning the late referral of the dispute before determining the jurisdictional issue amounts to such an irregularity that his ruling condoning the late referral of the dispute by the 4th and 5th Respondents stands to be reviewed and set aside. I rule accordingly.

10. I shall now deal with the application for the condonation of the late referral.

11. There is not much in dispute between the parties with regard to the material facts in this matter. Such facts may be summarised as follows :

11.1 As stated above, the 3rd to 6th Respondents were dismissed by the Applicant with effect from 31 July 1997 on the ground of operational requirements.

11.2 After their dismissal the 3rd and 6th Respondents referred the dispute to the CCMA on 9 July and 8 July, respectively and the 4th and 5th Respondents, on the 5th May 1999. There is a suggestion in the papers that the 4th and 5th Respondents might have referred the dispute to the CCMA in July 1998, and that was the finding of the 2nd Respondent. However, the only LRA Forms 7.11 on record relating to these Respondents are dated 5 May 1999.

11.3 Subsequent to their dismissals the 3rd to 6th Respondents instructed Attorney Peter Nkaiseng to handle this matter on their behalf. They later instructed Karichowsky, Solomon & Charalambous Attorneys to represent them.

11.4 The only reason given for the late referral of the dispute was that the said Respondents did not want to jeopardise their chances of obtaining a contract from the Applicant. The 2nd Respondent considered this a satisfactory reason.

11.5 The said Respondents apparently accepted the termination of their services and began the process of negotiating to be awarded the said contract by the Applicant. This process was no bar to the Respondents challenging their dismissals by referring the dispute to the CCMA, if they were so advised. Neither did they request the Applicant to agree to the extension of the time within which they could refer the dispute to the CCMA.

11.6 According to the Applicant, as a result of the delay in referring this matter to the CCMA, certain important witnesses had left its employ, and in one case, the country as well. That placed the Applicant at the risk of great prejudice were the application for condonation to be granted.

12. It is settled law that an applicant for condonation must show "good cause". The factors that are considered to establish whether "good cause" has been shown are the degree and extent of the delay, the explanation therefor, the prospects of success and the importance of the matter. These factors are interrelated and individually important, but the weight to be given to any one of them in any given case may vary. For instance, the importance of the matter and good prospects of success may tend to compensate for a long delay and a weak explanation. With regard to the explanation, such must cover the entire period in respect of which condonation is sought.

See : ***Melane v Santam Insurance Company Ltd*** 1962 (4) SA 531 (A).

13. The Applicant argues that the 2nd Respondent failed to exercise his discretion judicially upon a consideration of all the relevant facts and failed to apply relevant legal principles. Although he referred to the above-mentioned case in his ruling, the 2nd Respondent, so the argument goes, does not understand the principles set out in the ***Melane*** case**.** Support for this submission is said to be found in the manner in which the 2nd Respondent expressed himself when dealing with the issue of the prospects of success. Reference is made to the following remarks :

"*Mr Commissioner : Yes, look the issue of – the condonation issue, it has been held, you should be knowing that that you know you do not just consider the reasons for the dismissal – the reason for the delay, you are also include things such as the prejudice suffered by the other party, the prospect of success because why then do you grant condonation if you do not have the – I agree with you that where you discuss the merits of the case, especially on the application for condonation it is a matter of where people testify …(INAUDIBLE) … I simply do not understand how the Appellate decision – I have forgotten the citation of that case came to say one of the issues that we must take into account is prospects of success because surely one must be given an opportunity to cross-question if you deal with the merits of the case. I mean this is common sense but the problem it that is is an Appellate Division decision? Sanlam – Sanlam Insurance Company, 1961 case, you know said one of the issues that we must take into account is prospects of success. But I always say in my decision that look it is very difficult for me to come on the issue of the prospects of success because this is a matter where people must be cross-questioned or so on the merits of the case."*

See : **Record page 574 line 28 to 575 line 23. (Trancript page 66 to 67).**

14. There appears to be much force in the Applicant's submission that the 2nd Respondent did not understand the principles in the ***Melane*** decision. To the extent that I understand what the 2nd Respondent is trying to say, (it takes considerable effort to try to understand what he is saying), it appears to me that his concept of the "prospects of success" and how to establish them on the evidence, is seriously flawed. I do not accept the submission advanced on behalf of the Respondents that when the 2nd Respondent made reference to the ***"Sanlam Insurance Company"*** case, he was referring not to the ***Melane*** case, but to some other case. It is clear that, on account of his flawed understanding of the principle in the ***Melane*** decision, the 2nd Respondent failed to determine the role that the issue of the prospects of success played in the application for condonation. He does not seem to have given that factor any weight at all, and to the extent that he failed to do so, in my view, he committed a serious irregularity. To compound matters, the 2nd Respondent does not appear to have given any or sufficient consideration to the fact that, given the fact that important witnesses had left its employ, and in one case, the country, the Applicant would be prejudiced by the granting of condonation. Even when dealing with the issue of prejudice, he did not mention these facts.

See : **Record page 221 paragraphs 19 and 20 (also numbered page 501).**

15. For the reasons set out above, it is my judgment that the ruling of the 2nd Respondent wherein he condoned the late referral of the dismissal dispute of the 3rd and 6th Respondents should be reviewed and set aside. I rule accordingly.

16. The Applicant also applies for the review and setting aside of the 2nd Respondent's ruling on further irregularities that allegedly occurred during the hearing. The alleged irregularities are the following :

16.1 The 3rd to 6th Respondents were represented at the hearing by **Mr Soviti,** an attorney. However, the 2nd Respondent allowed a **Ms Govender,** an attorney who had previously represented the said Respondents, but who had withdrawn, to make representations on behalf of the said Respondents. The 2nd Respondent sought to justify his decision to allow **Ms Govender** to participate in the proceedings by claiming "***the right to call anyone who is not a party to this forum to assist"*** him.

See **Record page 564 line 16 – 19. (Trancript page 56).**

He did not disclose the source of such right or authority, and it is doubtful if he has it. If, however, he does have it, it should certainly not be exercised in the manner that he did.

16.2 Although the 2nd Respondent was in possession of the affidavits relied on by the 3rd to 6th Respondents, he proceeded to allow the 4th Respondent to lead *viva voce* evidence without being sworn in and being subjected to cross-examination, and to argue the condonation application himself, even though **Mr Soviti** was on record and was present as the attorney for the said Respondents. After the 4th Respondent had virtually completed giving his evidence and making his presentation, the 2nd Respondent sought to justify his decision to allow him to do so on the following basis –

"Mr Commissioner *: Let me – can we deal with another point, after the reason for – you see the affidavits are here, basically, I just wanted you to add something that you think we have forgotten to add, something like that. I think that I can make a decision on – based on this affidavit – answering affidavit. I do not want you to say many, many things, just to highlight – where I must concentrate on, and if ever you missed something, you must tell me basically. I will be able to be in a position to make a decision based on these affidavits. Do you still want to talk on the reasons for the delay?*

Magasela : Yes, to add.

Commissioner : Yes."

See : **Record page 565 line 12 – 25. (Transcript page 57).**

17. The submissions made on behalf of the Applicant are justified. A perusal of the record of the proceedings bears this out. The proceedings can only be described, without exaggeration, as a shambles – a case study of how not to conduct a hearing, even a CCMA hearing which allows for a degree of informality. The 4th Respondent's evidence and submissions extend over 18 continuous typed pages of the record (from **page 557 line 27 to 574 line 21 or 49 to 66 of the Transcript.)** It only came to an end when someone who is not identified in the Transcript, but who most probably was **Mr Chikane,** the Applicant's representative at the hearing, objected to the fact that the merits were now being canvassed by the 4th Respondent who was not talking under oath and who would have to be questioned on what he was saying.

See : **Record page 574 line 23 to 27 (Transcript page 66).**

18. By permitting **Ms Govender** to appear and represent the said Respondents as stated above and by allowing the 4th Respondent to give unsworn testimony and make submissions as described above, the 2nd Respondent committed a reviewable irregularity. The said irregularities are serious enough to warrant the setting aside of the proceedings, which I propose to do.

19. **With regard to costs:**

19.1 The 1st and 2nd Respondents indicated that they were abiding the decision of the Court. Notwithstanding such indication, the 2nd Respondent sought to introduce an "Explanatory Affidavit" which, while purporting not to oppose the application, vigorously defends his ruling and concludes by stating that he is of the view that the Applicant is not entitled to relief either as sought or at all. I do not believe that such conduct on the part of the 2nd Respondent warrants an adverse costs order against him and I do not propose making any such order.

19.2 The normal rule is that the costs follow the result. However, I have a wide discretion in considering and awarding costs. One of the factors I shall take into account is the fact that at the time of the hearing the Respondents were unemployed. The Applicant is a large public corporation with a deep pocket – that much I can take judicial notice of. Furthermore, there is nothing in the conduct of the Respondents that warrants any censure. They were obviously attempting to vindicate what they believed to be their rights in an employer/employee situation. I do not believe that I should order any of them to pay the Applicant's costs. I, therefore, do not propose to make any order of costs against the Respondents.

20. The final question I have to consider is the form of order to give.

20.1 In the light of the finding I made with regard to the issue of jurisdiction it will be appropriate to make a declaration of my finding and then set aside the ruling of the 2nd Respondent for want of jurisdiction.

20.2 With regard to the applications of the 3rd and 6th Respondents, I have already found not only that the proceedings were vitiated by irregularities, but also that in considering the merits of the applications for condonation the 2nd Respondent failed to apply the applicable legal principles and failed to take into account matters that he should have,

thereby committing serious and reviewable irregularities. On those grounds the ruling of the 2nd Respondent in relation to the applications of the 3rd and 6th Respondents falls to be set aside. Had I not found jurisdictional grounds for setting aside the 2nd Respondent's ruling in relation to the 4th and 5th Respondents, I would have found that the same grounds as I did in relation to the 3rd and 6th Respondents apply to them *a fortiori*, based on the fact that their period of delay was, in all probability, longer by about 10 months.

20.3 Furthermore, I do not consider this to be a case where I can properly substitute my discretion for that of the 2nd Respondent, and no application has been made to me to do so.

20.4 Finally, I have to consider whether or not to remit the matter to the 1st Respondent for the application for condonation in respect of the 3rd and 6th Respondents to be considered afresh by a Commissioner other than the 2nd Respondent. I believe that whether or not I make such an order, the 3rd and 6th Respondents would be entitled to approach the 1st Respondent for such relief. By not making such an order, I am not closing the door on the said Respondents. I do not propose making an order for the remittal of this matter to the 1st Respondent.

21. In the circumstances I make the following orders :

(a) It is hereby declared that the 1st Respondent does not have the jurisdiction to conciliate the dispute involving the 4th and 5th Respondents and, therefore, lacks jurisdiction to consider and condone their applications for the late referral of their dismissal dispute to the 1st Respondent.

(b) The ruling made by the 2nd Respondent dated 28 April 2000 to consider and grant the application by the 4th and 5th Respondents for the condonation of the late referral of their

dismissal dispute to the 1st Respondent for conciliation is hereby reviewed and set aside.

(c) The ruling made by the 2nd Respondent dated 28 April 2000 to grant the application by the 3rd and 6th Respondents for the condonation of the late referral of their dismissal dispute to the 1st Respondent for conciliation is hereby reviewed and set aside.

(d) Each party shall pay her, his or its own costs.

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MOERANE AJ.
ACTING JUDGE OF THE LABOUR COURT
31 JANUARY 2003.

FOR THE APPLICANT	MASERUMULE INCORPORATED
FOR THE 1ST AND 2ND RESPONDENTS	CCMA
FOR THE 3RD – 6TH RESPONDENTS	SOVITI ATTORNEYS
DATE OF COMPLETION OF JUDGMENT	31 JANUARY 2003
DATE OF HANDING DOWN OF JUDGMENT	FEBRUARY 2003.