

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT PORT ELIZABETH**

REPORTABLE

CASE NO: P502/02

Date Heard:13/02/03

Date Delivered:24/02/03

In the matter between:

**SAPPI TIMBER INDUSTRIES (PTY) LTD
T/A BOSKOR SAWMILL**

APPLICANT

and

**Commission for Conciliation,
Mediation and Arbitration**

FIRST RESPONDENT

COMMISSIONER A LEVENDAL

SECOND RESPONDENT

CEPPWAWU obo NJIKWA & MOEKETSI

THIRD RESPONDENT

J U D G M E N T

PILLAY, J

THE FACTS:

1. The third respondent referred a dismissal dispute to the first respondent, the Commission for Conciliation, Mediation and Arbitration ("CCMA"). It was conciliated on 2 November 2001. The Commissioner undertook to issue the certificate by 5 November 2001. The certificate was issued on 19 April 2002, served on the third respondent but not on the applicant, who became aware of it on 22 May 2002 when was delivered with the referral to arbitration.
2. Neither the CCMA, nor the Commissioner, the second respondent, has tendered any explanation for the delay in issuing the certificate. The circumstances clearly call for an explanation, which even though is no longer relevant to this application, may be important for the efficiency of the CCMA. I intend to give some directives in this regard in due course.

FOR THE APPLICANT:

3. Mr Bleazard for the applicant submitted that the certificate should be set aside because of the failure on the part of the CCMA and the Commissioner to serve it and the extraordinary delay that preceded its issue. The certificate should, in terms of section 135(5)(a) of the Labour Relations Act 66 of 1995 (the "LRA"), have been issued immediately or

soon after conciliation. The delay was prejudicial to the applicant who was entitled to assume that the third respondent had abandoned its claim. The third respondent's remedy lies against the CCMA or the Commissioner, if the certificate is set aside. So it was submitted for the applicant.

FOR THE RESPONDENT:

4. Mr Wade for the third respondent, relying on the approach of the Labour Courts to the requirement that awards must be issued within 14 days submitted that the word "must" in section 135(5)(a) should be interpreted as a guideline. (Free State Buying Association Ltd t/a Alpha Pharm v SACCAWU and Another (1999) 3 BLLR 223 (LC); A A Ball (Pty) Ltd v Kolisi and Another (1998) 6 BLLR 560 (LC); Standard Bank of SA Limited v Fobb and Others [2002] 9 BLLR 900 (LC)) Therefore the issue and service of the certificate were mere formalities. As non-compliance therewith was not a jurisdictional pre-requisite, the validity of the certificate was immaterial and did not fall to be set aside. It was not required for the purposes of arbitration as it was common cause that conciliation had already taken place.
5. He conceded that the commissioner did not issue the certificate within a reasonable time. But, as the certificate was not a prerequisite in terms of section 191(5) for arbitration, it was irrelevant whether and when it had been issued.
6. It serves an administrative purpose of recording the fact that the dispute was conciliated and resolved or unresolved.

7. The facts in this case were distinguishable from a situation where the CCMA refused to issue a certificate e.g. because it lacked jurisdiction.
8. Finally, the non-service and delay in the issue of the certificate were not *per se* prejudicial. The applicant failed to establish what prejudice it suffers as a result of the delay. (County Fair v CCMA and Others [1998] 6 BLLR 577 (LC); PPWAWU & Another v Commissioner: CCMA (Port Elizabeth) & Another [1998] 5 BLLR 499 (LC); Mshibe v Rama's Transport/Belmont Transport [1998] 12 BLLR 1314 (LC); Afrox Limited v Laka and Others [1999] 5 BLLR 467 (LC)). Evidence of such prejudice as the applicant might suffer should be led at the arbitration where it could raise pleas of waiver, estoppel or failure to act vigilantly against the claim of the third respondent.
9. The suggestion that the third respondent should sue the Commissioner and the CCMA was without merit or judicial precedent and an abuse of the process. So it was submitted for the third respondent.

ANALYSIS:

10. I consider firstly the requirements for arbitration and the relevance of the certificate therefor. If the certificate is necessary to trigger arbitration in this case, then I must consider whether it was validly issued. If it is not required then its validity or otherwise would be of academic interest and this application should be dismissed.
11. Section 191(5) of the LRA provides:

“If a council or a commissioner has certified that the dispute remains unresolved, or if 30 days have expired since the council or the Commission received the referral and the dispute remains unresolved-

a. the council or the Commission must arbitrate the dispute at the request of the employee if-....”

12. Arbitration can be triggered therefore either upon the issue of a certificate or upon the expiry of 30 days after the referral for conciliation and the dispute remaining unresolved. Thus an applicant is not without a remedy to invoke the next procedural step if there is a delay in the issuing of the certificate or if it is not issued at all (De Vries v Lionel Murray Schwormstedt & Louw (2001) 22 ILJ 1150 (LC); Louw v Micor Shipping (1999) 12 BLLR 1308 LC at para 9).

13. Prior to its amendment, section 136(1) did not prescribe any time limit for the referral to arbitration. The approach of the Labour Court then was to require that it be made within a reasonable time (Chemical Workers' Industrial Union v Darmag Industries (Pty) Ltd (1999) 20 ILJ 2037 (LC) at para28).

14. After its amendment by section 9(a) of Act 127 of 1998, section 136(1) reads:

“Appointment of commissioner to resolve dispute through arbitration

If this Act requires a dispute to be resolved through arbitration, the Commission must appoint a commissioner to arbitrate that dispute, if-

a. commissioner has issued a certificate stating that the dispute

remains unresolved; and

- b. within 90 days after the date on which that certificate was issued, any party to the dispute has requested that the dispute be resolved through arbitration. However, the Commission, on good cause shown, may condone a party's non-observance of that timeframe and allow a request for arbitration filed by the party after the expiry of the 90-day period.”

15. Whereas a time limit is now set in section 136(1) for the referral to take place within 90 days when a certificate is issued, no time limit is prescribed for the referral to arbitration upon the expiry of 30 days after the referral to conciliation, that is when the referral to arbitration takes place without a certificate.
16. This discussion about referrals to arbitration applies equally to referrals to the Labour Court. Section 191(11), which corresponds with section 136(1), also prescribes a 90-day time limit for referral to the Labour Court only if a certificate is issued.
17. In the absence of statutorily prescribed time limits the approach of the Court has been to require that steps in litigation be undertaken within a reasonable time (JDG Trading (Pty) Ltd t/a Bradlows Furnishers v Laka NO & Others (2001) ILJ 641 (LAC); Wanenburg v Motor Industry Bargaining Council & Others (2001) 22 ILJ 242 (LC); Els Transport v Du Plessis & Others (2001) 22 ILJ 1390 (LC); Liberty Life Association of Africa v Kachelhoffer NO & Others (2001) 22 ILJ 2243 (C); Wolgroeiërs Afslaers (Edms) Bpk v Munisipaliteit van Kaapstad 1978 (1) SA 13 (A) at 39A-B; Softex Mattress (Pty) Ltd v Paper Printing Wood & Allied Workers Union & Others (2000) 21 ILJ 2390 (LAC); Queenstown Fuel Distributors CC v Labuschagne NO & Others (1999) 20 ILJ 928 (LC); Librapac CC v

Fedcrow & others (1999) 20 ILJ 1510 (LAC); Chemical Workers Industrial Union V Darmag Industries (Pty) Ltd (1999) 20 ILJ 2037 (LC); Kruger & Another v Macgregor NO & Another (1999) 20 ILJ 2065 (LC); De Vries, supra).

18. In this case, as it is common cause that the dispute was conciliated and remained unresolved, I find that these jurisdictional facts to trigger arbitration were established, irrespective of whether the certificate was issued. If the third respondent relied on compliance with the facts *per se* to proceed to arbitration, then it would have had to refer the dispute after 30 days expired since the CCMA received the referral for conciliation and within reasonable time (section 191(5)).
19. However, the third respondent relies not on the facts *per se* to found jurisdiction for arbitration but on the certificate. The certificate is therefore the *sine qua non* for arbitration. Contrary to Mr Wade's submission, its validity is therefore material.
20. On the plain and literal interpretation of section 136(1), the referral to arbitration had to be made within 90 days of the certificate being issued. That was done in this case. Provided that the certificate is valid, the CCMA would have jurisdiction to arbitrate. There would also be no need for condonation of the referral to arbitration as it is timeous.
21. In De Vries, the facts were similar to this case. In that case, the certificate was issued more than a year after the referral for conciliation and about 10 months after conciliation failed. The referral to arbitration was made within 14 days after the certificate was issued. Applying a literal interpretation to section 191(11) the learned Judge Waglay accepted that the referral to the

Labour Court was timeous. However, by reasoning that the purpose of section 191(11) was to set time limits to institute proceedings in the Labour Court, the referral was out of time and called for an application for condonation, which he granted.

22. I am in respectful disagreement with my learned brother. As discussed above, if the certificate is relied upon to found jurisdiction, then the referral must be made within 90 days of the issue of the certificate. If the facts relied upon to found jurisdiction are that 30 days expired after the referral for conciliation and the dispute remains unresolved, the referral must be made within a reasonable time. If it is not made within a reasonable time, an application for condonation must be made.
23. A reasonable time for referring a dispute if a certificate is not issued is, in my view, 90 days. There is no logical basis to set a standard different from that which applies when a certificate is issued. The omission to legislate a time limit seems to be an inadvertent omission by the drafters rather than a deliberate attempt to prescribe a different standard.
24. The crux of this case is whether the certificate relied upon for the referral to arbitration is valid. A valid certificate obliges a commissioner to arbitrate the dispute, if all other requirements are met (Fidelity Guards Holdings (Pty) Ltd v Epstein & Others (2000) 3 BCLR 271 LC at para 9; Fidelity Guards Holdings (Pty) Ltd v Epstein N.O. and Others [2000] 12 BLLR 1389 (LAC); section 191(5)(i)).
25. Section 135(5)(a) provides:

“When conciliation has failed, or at the end of the 30-day period or any further

period agreed between the parties, the commissioner must issue a certificate stating whether or not the dispute has been resolved;”

26. In my view, the word “must” in section 135(5)(a) is peremptory (National Union of Metalworkers of SA & Others v Driveline Technologies (Pty) Ltd & Another (2000) 21 ILJ 142 (LAC); De Vries, supra; Louw, supra; Ndokweni v Game Stores and Others [2001] 6 BLLR 643 (LAC)). That is also the view I held in relation to section 138(7) in Standard Bank v Fobb (*supra*) at para 6. No time limits are prescribed as to when the certificate should be issued. What I found to be a guideline in section 135(7) was the time limit of 14 days to issue an award. Mr Wade’s interpretation of my decision in the Standard Bank case (*supra*) is therefore misconceived.
27. Section 135(5) prescribes no time limit for the issuing of the certificate. (Louw, supra) Mr Bleazard concedes, correctly in my view, that the third respondent’s failure to refer the dispute within 30 days after conciliation has no effect on the validity of the certificate. In his view, it is the non-service and delay in issuing the certificate that result in a nullity.
28. In itself, the CCMA’s omission to serve the certificate on the applicant is a formal and not a material non-compliance in the circumstances of this case. If the non-service of the certificate was prejudicial to the applicant, it could have prevented or limited the prejudice by requesting the certificate from the CCMA. There is no evidence that it did so. Nor is there evidence as to what it might have done or not done if it had been served with the certificate.
29. The certificate became relevant only when the third respondent launched the arbitration. Even though the CCMA did not serve it, the applicant

nevertheless received it from the third respondent together with the arbitration referral. As the applicant was notified at the time that he needed to know of the certificate, the non-service of the certificate by the CCMA is not a material irregularity. The delay in the issue of the certificate is a separate question.

30. On the basis that litigation should be processed within a reasonable time, the certificate should be issued within a reasonable time. Justice delayed is justice denied. In Louw, *supra* Mlambo J was required to decide on the validity of a certificate that was issued after conciliation took place six months since the referral. The Court found that the conciliation was a nullity but the certificate, which was issued on the day of the conciliation was valid because it was issued after 30 days of the referral. (at para 8)
31. I agree with Mr Bleazard, that a reasonable time for the issue of the certificate is immediately after or as soon as possible after conciliation or, if there is no conciliation, as soon as possible after the expiry of 30 days from the date of the referral. I say so because disputes must be resolved expeditiously in accordance with the objects of the LRA. As an instrument that is necessary to advance the dispute resolution process the certificate should be issued without delay. It serves a twofold purpose:
32. The purpose of the certificate is firstly evidentiary. It serves as *prima facie* proof of the facts certified therein, i.e. the identities of the parties; the referral to conciliation; the date thereof and the date on which the dispute was resolved or remained unresolved. (also section 157(4)(b))
33. The second purpose of the certificate is to invoke the jurisdiction of the CCMA in terms of section 136(1) and the Labour Court in terms of section

191(11) read with section 191(5) respectively, to adjudicate the dispute. Section 136(1) read with section 191(5) is peremptory as regards the jurisdiction of the CCMA. I accordingly align myself with the views of Pillemer AJ in the Labour Court in Fidelity Guards (*supra*).

34. However, a certificate could be a nullity if it is vitiated by an irregularity that goes to the root of the facts that it seeks to confirm. If a certificate is fraudulently issued or obtained or which contains incorrect or false information, it would not amount to proof of the facts contained therein and would therefore be a nullity. That would be so for instance, if the certificate states that the dispute is not resolved at conciliation and it is proven that it was settled there.
35. Having regard to the evidential and jurisdictional effects of the certificate, the question is: Does the delay in issuing the certificate negate its legal effect? Any delay in the issuing of the certificate cannot result in its nullity for the reasons discussed hereunder.
36. Firstly, the certificate cannot be set aside in so far as it serves a legal purpose. In this case, the certificate is factually correct in all respects. It records that the dispute remained unresolved as at 2 November 2001 and that the certificate was issued on 19 April 2002. It therefore has evidential value. As I have found that it is an instrument that triggers arbitration, it fulfils its second purpose.
37. Secondly, the effect of Mr Bleazard's argument, if it were accepted, would be that a party who, relying on a literal interpretation of section 136(1) and 191(11), and who depends for jurisdiction on the certificate, might find itself automatically unsuited by the inaction of the CCMA and the effluxion

of time. Members of the public are entitled to expect the CCMA to perform its functions lawfully and timeously. To hold that a party can lose its right to arbitration or to access to the Labour Court as a result of the delayed action by the CCMA, a third party and a public facility, would be inherently unjust.

38. Thirdly, the constitutionality of the acts or omissions of a public body or a third party which results in denying a person access to a tribunal or forum in section 34 of the Constitution Act 108 of 1996 ("the Constitution"), is in issue. However, it was not raised by either party in this case.

39. In Driveline Technologies, *supra* Conradie J pointed out that a party who fails to comply with its obligations may very well deprive itself of a hearing. But, that does not deprive the court of jurisdiction. Obligations imposed on parties are not usually intended to be jurisdictional preconditions, the Court observed. I doubt that this generalisation can apply without qualification when a public entity such as the CCMA fails to comply with its statutory mandate. A party who is not issued with a certificate will have not two but only one route to arbitration, that is, to refer the dispute within a reasonable time after 30 days expire since the referral to conciliation.

40. My *prima facie* view is that if the legislature intended the effect of such acts or omissions of the CCMA to be a limitation or restriction of the exercise of a fundamental right, it would have expressly authorised it.

41. The Constitutional Court has applied a strict interpretation of the limitation clause, section 36 of the Constitution, to ensure that only limitations that are reasonable and justifiable in an open and democratic society are permitted. (Islamic Unity Convention v Independent Broadcasting

Authority and Others 2002 (4) SA 294 (CC) at para 38; Ex Parte Minister of Safety and Security and Others: In Re S v Walters and Another 2002 (4) SA 613 (CC) at para 27)

42. Nothing in the LRA lends itself to a construction which deprives the third respondent of its rights in terms of section 34 of the Constitution. On the contrary, the literal interpretation of sections 136(1) and 191(11) read with section 191(5) discussed above, facilitate access to the CCMA and the Labour Court. Like section 135(5), they too place no limits on the timing of the issue of the certificate. Section 191(5) is not even qualified by words such as “whichever occurs first” after the word “referral.” Read together, sections 135(5), 136(1) and 191(5) dispel any suggestion that the failure to issue a certificate would result in a nullity that would have the effect of barring a party from access to a tribunal or forum. This construction promotes compliance with the LRA in a manner that is also consistent with the Constitution.
43. Section 34 underpins a “deeper principle” that underlies the right of access to a tribunal or forum. That right in this case is the right to fair labour practices (*per* Mokgoro J in Chief Lesapo v North West Agricultural Bank and Another 2000 (1) SA 409 (CC) at para 16, also paras 5, 13.)
44. The situation would be different if the CCMA refused to issue the certificate. A party who waits for the issue of a certificate in those circumstances runs the risk of being unsuited altogether if no certificate is issued and an unreasonable period lapses after the expiry of 30 days from the referral to conciliation (De Vries, *supra*, at para 25).
45. An application to the Labour Court to compel the issue of a certificate

would be an unnecessary exercise if the applicant is able to refer the dispute within a reasonable time after the 30 days expired after the referral to conciliation. If an applicant is not able to do so, but is able to show good cause why the CCMA should issue the certificate, such an application to this Court may be warranted.

46. The Labour Court is also the forum to which applications for the review and setting aside of a certificate should be made. In this case, the CCMA correctly refused to withdraw the certificate. This situation seems distinguishable from a case where, for instance, the certificate contains typographical errors, or errors common to the parties or where the parties consent to the certificate being varied or rescinded. It is arguable that the power to do so stems from section 144. That section deals with the variation and rescission of arbitration awards and rulings, and the word “ruling” could mean “an authoritative pronouncement” which is what a certificate is. (The New Shorter Oxford English Dictionary)

47. In Fidelity Guards (*supra*), Pillemer AJ said that a certificate issued “out of time” may be set aside on review (para 15 G – H). The relief sought in that case was not to review and set aside the certificate. In the context, the learned Judge appears to have made the statement in passing. It is not an issue that was canvassed in the judgment of the Labour Appeal Court in that case. In the context of the discussion of the relevant sections in this case, and the evidentiary and judicial purposes of a certificate, in my respectful view a certificate cannot be set aside because it is out of time.

48. The consequence of holding as I do that a certificate must be issued within a reasonable time is not that it is a nullity if it is not issued within a reasonable time. However, a party who relies for jurisdiction to proceed to

arbitration on a certificate that is issued after much delay, may be required to explain at the arbitration why the dispute was not referred within 90 days after the 30 days expired since the CCMA received the referral for conciliation. Such an explanation may go to determining whether an applicant should be penalised for delaying the arbitration.

49. An applicant could be penalised if it could have, but fails, to refer the dispute as soon as possible after the 30 days expire from the referral to conciliation. The penalty, however, is not to deprive the applicant of its right of access to a forum but to make an appropriate award. (See e.g. section 194 which, prior to its amendment in 2002, deprived an employee of compensation for any unreasonable period of delay and which now requires that compensation be just and equitable).
50. This requirement serves as an incentive to expedite the resolution of the dispute. Relative to an absolute bar to access to a tribunal or forum, it is a less restrictive means of promoting the object of the LRA, namely, the expeditious resolution of disputes (section 36 of the Constitution; Islamic Unity Convention v Independent Broadcasting Authority and Others 2002 (4) SA 294 (CC) at para 38; S v Mamabolo (eTv and Others Intervening) 2001 (3) SA 409 (CC) at para 49.)
51. The approach to section 135(5); 136(1) and 191(5) on the facts of this case is to balance the right of access to a tribunal or forum with the obligation to do so expeditiously.
52. This approach should not be construed as a licence by the CCMA to delay the issue of certificates. A Commissioner who delays the issue of a certificate can be held to account administratively to the Director of the

CCMA.

53. Finally, Mr Bleazard's submission that the third respondent should pursue a claim against the CCMA and the Commissioner is rejected. Such a claim cannot be for unfair dismissal. Furthermore, in terms of section 126(2) the CCMA is not liable for any loss suffered by any person as a result of any act performed or omitted in good faith in the course of exercising the functions of the Commission. There is no evidence in this case of bad faith on the part of the Commissioner.

54. ORDER:

1. The application is dismissed with costs.
 2. The registrar is directed to bring this judgment to the attention of the Director of the CCMA, with the request that he investigate the reasons for the failure by the Commissioner to firstly issue the certificate timeously, and secondly, to provide an explanation therefor to this Court.
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JUDGE D PILLAY

APPEARANCES:

FOR THE APPLICANT : MR BRIAN BLEAZARD
BRIAN BLEAZARD ATTORNEYS

FOR THE RESPONDENT : ADVOCATE WADE
INSTRUCTED BY : ATTORNEY GRAY MOODLIAR