IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN **CASE NO.JR502/01**

In the matter between:

SOUTH AFRICA TRANSPORT AND ALLIED WORKERS UNION O.B.O SIMEON SIMELANI
APPLICANT

And

NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT INDUSTRY FIRST RESPONDENT

THE DISPUTE COMMITTEE OF COUNCIL **SECOND RESPONDENT**

W. K. VAN DER MERWE TRANSPORT THIRD RESPONDENT

JUDGMENT

ZILWA AJ

INTRODUCTION

1. This is an application brought in terms of section 158 (1) (g) of the Labour Relations Act no. 66of 1995 (Athe Act@), for the review and setting aside of the ruling made by the second respondent under the auspices of the first respondent on the 13th March 2001, in

terms of which the second respondent refused to grant condonation to its member, SIMEON SIMELANI (Athe employee@) for the late referral of the dispute to the first respondent in terms of section 19(2) of the Act.

The third respondent opposed the application.

2. The court was asked to determine whether, on the facts and applicable law, the second respondent has failed to apply its mind properly when it considered the applicant=s application for condonation that was placed before it.

BACKGROUND FACTS

3. The employee was dismissed by the third respondent on the 28th September 2000. The employee then approached the applicant with a view to pursue the matter in terms of the dispute resolution mechanism.

4. The applicant referred the dispute to the Commission for Conciliation Mediation and Arbitration (Athe CCMA@) on the 27th October 2000.

5. On the 14th November 2000 the applicant received a letter from the first respondent dated the 1st November 2000 stating that the dispute is required to be referred to the first respondent being the appropriate Bargaining Council that has jurisdiction in the matter.

6. The applicant referred the dispute to the first respondent on the 22nd November 2000 without an application for condonation for the late referral thereto.

7. On the 7th December 2000 the first respondent addressed a letter to the applicant advising, inter alia, that the applicant must apply for condonation, and a requisite application form was attached thereto with the instruction that it must be completed by the employee in detail. This letter was apparently received

by the applicant on the 21st December 2000.

8. The application for condonation, in a form of an affidavit, was submitted by the employee to the first respondent under cover of the applicant=s attorneys of record on the 15th January 2001.

9. The second respondent considered the employee=s application for condonation on the 13th March 2001 and was refused by second respondent. It concluded, from the facts presented before it, that the employee failed to explain the delay in the referral of the matter to it, that the applicant was clearly negligent in not correctly referring the matter, and in particular the prospects of success had not been adequate dealt with.

FACTS PRESENTED BY THE APPLICANT TO THE FIRST RESPONDENT

10. In his affidavit in support of his application for condonation the employee stated the date of dismissal (28 September 2000), the date of referral of the matter to the CCMA (27 October 2000), the date on which the applicant received the letter from CCMA (14 November 2000) and the date on which the dispute was referred to the first respondent (22 November 2000).

11. It further stated that as at the referral date the matter was already out of the 30 days limit and that the cause of lateness was due to the applicant referring the matter to a wrong body and the applicant had to be blamed for that situation, for being 24 days late.

12. On the issue of the prospects of success, the employee merely stated that Athere are prospects of success because the dismissal is substantively and procedurally unfair@.

13. The issue of prejudice was addressed by stating that a notice will be given to the third respondent in order to have their

representative present, and that if the application is not granted he will be prejudiced because that will be the end of the matter.

FACTS PRESENTED BY APPLICANT IN THIS COURT

14. In his affidavit submitted in support of the review application in this court, the employee has in essence re-iterated the facts deposed to in the affidavit presented to the first respondent. However, of more significance, for the first time the employee discloses that an internal disciplinary hearing was held on or about the 19th June 2000, constituted by the third respondent to determine certain charges against him which was chaired by an external chairperson, that he was found not guilty, and that the third respondent held a further hearing in form of an appeal which took place on the 28th September 2000, where he was found guilty and dismissed. (paragraph 6.2 of employee=s affidavit)

15. When addressing the issue of prospects of success, the employee refers to his averments in paragraph 6.2 of his affidavit which facts were not presented to the first respondent.

16. The applicant contends that the 24 days delay was not substantial and that he has tendered a reasonable explanation thereof, and that there is no prejudice to be suffered by the third respondent.

GROUNDS OF REVIEW

17. It is trite law that the Labour Court has wide jurisdiction to review decisions and ruling made by other relevant bodies in terms of section 58 (1) (g) of the Act. However, this court does not have unlimited powers to review and substitute its own decision with that of the relevant body under review.

18. I refer to the relevant case of MOOLMAN BROS V. GAYLARD N. O. AND OTHERS (1998) 19 ILJ 150 LC, where Seady AJ said the following:

> AThe decision of a commissioner to condone the late referral of an unfair dismissal dispute in terms of section 191 (2) of the Act is discretionary in nature. It is not a purely judicial decision, although of course the decision must be exercised judicially, on a consideration of all the facts and what would be fair to both sides. This court should not readily interfere with the exercise of discretion. If in the exercise of this discretion, a commissioner makes an error in law, this does not render the decision of the commissioner reviewable unless it is a material error in the sense that it results in the commissioner=s asking the wrong question or basing his or her own decisions on a matter not prescribed by the statute. The Act does not suggest that the legislature intended this court to interfere more readily in decisions of this nature. Accordingly if the first respondent made an error in law in coming to her decision to grant condonation, this court must accept that discretionary decision whether right or wrong and not interfere with the first respondent=s views merely because it believes these views to be wrong@. (emphasis added)

19. The learned judge further stated at page 156 A through to D the following:

> AThis is not an appeal from the decision of the commissioner, it is an application for review and set aside her decision on the grounds that it was grossly unreasonable or seriously irregular. I doubt that this court, on the facts before the first respondent would have granted condonation. However, this does not make first respondent=s decision reviewable. In determining whether good cause was shown, first respondent applied

her mind to the factors set out in Melane=s case and having considered them and the philosophy behind the Act, she decided to grant condonation. I do not think that it can be said that she acted in a way that was grossly unreasonable or seriously irregular because of the weight that she attached to each emphasis to the explanation for the lateness cannot be regarded as grossly unreasonable or seriously irregular. First respondent weighed the Melane factors against the other, not treating any one of them as individually decisive. In doing so, she applied her mind and exercised her discretion judicially. This approach to condonation has a long history and has recently has been endorsed by the labour Appeal Court in Forster V. Steward Scott Inc. (1997) 18 ILJ 367 (LAC) at 369 C-E@ (emphasis added).

20. see also Edgars Stores (PTY) LTD V. Director, CCMA and others (1998) 1 BLLR 35 LC

21. It is apparent from the second respondent=s reasons for refusing the application for condonation that they followed the principles enunciated in MELANE V. SANLAM INSURANCE CO. 1962 (4) S. A. 531 (A), it considered the degree of lateness, reasons or grounds for lateness, prospects of success and the potential prejudice to the parties.

22. It seems to me that it was critical that the applicant failed to state any ground in support for his prospects of success as required by the Melane case which was duly adopted by this court in the Foster case supra.

23. In reading the case of JAMELA V. ACCORD (2001) 2 BLLR 150 (LC) referred to by the applicant, which I consider as an *obiter dictum*, I am not persuaded that it stands as an authority in support of an applicant who has failed to mention any prospects of success in his application for condonation. I can only conclude that it only assists an applicant who has not

dealt comprehensively with the prospects of success and cannot assist an applicant who has failed to do so at all. I am not convinced that my brother Waglay intended to jettison the Melane principles.

24. In any event, without necessarily making a finding on whether on the facts presented by the employee to the first respondent were sufficient or not, I am inclined to follow Seady J. in the Moolman case supra in that the second respondent did apply its mind to the application, consider the relevant principles in the Melane case and exercised its discretion judiciously on the facts presented before it. Consequently this court must accept this discretion in the absence of gross unreasonableness on its part. In the circumstances I am not convinced that the second respondent did not apply its mind when it considered the application for condonation.

25. In the circumstances I make the following order:

a. The application is dismissed

b. There be no order as to costs

ZILWA A J

DATE OF JUDGMENT : 28 MAY 2003

FOR APPLICANT : G. N. MOSHOANA OF MOHLABA & MOSHOANA INC.

FOR RESPONDENT : D. J. COETSEE OF DIRK COETSEE ATTORNEYS