

IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

CASE NO. JR 163/03

AZARIA OUPA MONARENG

APPLICANT

AND

COMMISSIONER FOR CONCILIATION

MEDIATION AND ARBITRATION

1ST RESPONDENT

RAYMOND DIBDEN

2ND RESPONDENT

PEOPLES BANK LTD INC. PEP BANK

3RD RESPONDENT

JUDGMENT

PAKADE. J

[1] This is an application for review of the second respondent's refusal to grant the applicant condonation for the late referral of his dismissal by the third respondent.

[2] The applicant, who was dismissed by the third respondent on 12 December 2002 for misconduct, referred the dispute to CCMA on 15 July 2003. The duration of the delay is about seven months.

[3] The reasons furnished by the applicant for the late referral of the dispute are that he was sick from 05 January 2003 to March 2003 and had to undergo treatment by the traditional healer. While still undergoing

treatment, he was fetched by his wife from the traditional healer because he was wanted by the police for a fraud charge which had been preferred against him by the third respondent. He was then arrested. He was released on bail on 4 July 2003. On 11 July 2003 the charges were withdrawn against him. The second reason is that on 04 January 2003 he obtained legal advice that he should appeal against his dismissal.

[4] The second respondent's reasons for refusing condonation is that the reasons furnished by the applicant for late referral were unsubstantiated as there was no documentary evidence in support of his contention that he was sick. Secondly the second respondent found that the applicant has not shown good prospects of success on the merits.

[5] Indeed it is not clear why the applicant could not refer the dispute before the 5th January 2003. However having regard to the fact that he had to seek legal advice which he obtained on 04 January 2003, it may well be that he did not know what to do from the 12th December 2002 to 4 January 2003. The very fact that he got advice to appeal from outside the disciplinary inquiry indicates to me that his rights were not fully explained to him by the presiding officer. In my view with this kind of undisputed explanation of the applicant, the second respondent should have found that the applicant has, on a balance of probabilities, sufficiently explained the delay.

[6] With regard to prospects of success, the applicant explained that when he was trying to present his case the chairperson of the Disciplinary Inquiry interjected and told him that he was misleading the inquiry. The type of evidence he was presenting was that another employee had entered his teller screen. The presiding officer asked him how could that happen, and instead of investigating this piece of evidence, told him that he was misleading the enquiry. On this basis the applicant gained an impression that the presiding officer was biased against him and had prejudged the case. The second respondent does not appear to have considered this point in his ruling as it was material to and relevant on prospects of success. Had he applied his mind on this issue and explore it sufficiently, he might have arrived at a different finding on the prospects of success more so that the applicant's complaint was also that he was not allowed to call his witness and his side of the story was not properly considered. These allegations against the presiding officer are consistent with his failure to inform the applicant of his right to appeal against his finding. As the third respondent has not disputed these allegations the matter had to be decided on the version of the applicant. It discloses good prospects of success.

[7] Employment is a fundamental right of a person and it should not be easy to deny an employee access to court on a mere technicality where he has to vindicate his right to fair labour practice. A measure of

flexibility is required in the Court's exercise of discretion. Once doors of the court are closed behind the litigant, that is the end of his right. Although the applicant's explanation of the delay is not watertight he has shown good prospects on the merits. Having regard to the principle that the apparently good prospects of success on the merits may compensate for a poor explanation, (**ZEALAND v MILBOROUGH 1991 (4) SA 836 (SECLD)**), the applicant must therefore succeed.

[8] In the result the following order is made:

1. The second respondent's refusal to grant the applicant condonation for late referral of the dispute is set aside and the applicant is granted condonation.
2. The applicant is granted leave to refer the unfair dismissal to Labour Court for adjudication.
3. There shall be no order for costs.

PAKADE J

JUDGE OF THE LABOUR COURT

DATE OF HEARING : 24 February 2004

DATE OF JUDGMENT : 16 March 2004

APPEARANCES

FOR THE APPLICANT : In Person

FOR THE RESPONDENT : No appearance