REPORTABLE

IN THELABOURCOURTOF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Case No: J4322/02

In the matter between

IAN DONALD WOOD — Applicant

and

MR POTANE N.O. — 1st Respondent

METAL & ENGINEERING INDUSTRIES BARGAINING COUNCIL — 2nd Respondent

ALSTON (PTY) LTD t/a MEISSNER — 3rd Respondent

JUDGMENT

TOKOTA AJ:

[1] The applicant was employed by the third respondent until his services terminated in May 2002. It is in dispute as to whether he was dismissed or not. The third respondent contends that the contract of employment came to an end by effluxion of time and the applicant contends that he was dismissed. However, for purposes of this judgment I need not decide this point.

[2] Subsequent to his alleged dismissal the applicant declared a dispute of unfair dismissal and referred the matter to the Commission for Conciliation Mediation and Arbitration

(CCMA). This was done on 29th June 2002. Thereafter his attorneys received a letter on 15 July 2002, in which third respondent's attorneys advised them that CCMA was a wrong forum and that the second respondent was the correct forum. The applicant then referred the matter to the second respondent on 27th August 2002.

[3] An application for condonation for the late referral of the said dispute was made before the first respondent. The first respondent dismissed such application on the basis that:

a) No good cause was shown for the delay;
b) The degree of the delay was "too much";
c) The prospects of success on the merits were very slim.

The above findings prompted the review proceedings.

[4] It was contended on behalf of the third respondent, who is opposing the application that no grounds for the review were shown. This contention has merit. Although the applicant has made the usual allegations of the grounds for review, these are not supported by the facts placed before me. In any event, as will be shown hereunder, the there is no basis upon which the award can be interfered with.

[5] It is now well established that a court or tribunal has a discretion whether or not to grant condonation for the late bringing of the review. This discretion must be excercised judiciously, regard being had to the relevant circumstances, including, but not limited to, the degree of the delay, the prejudice that other parties have or are likely to suffer as a result of the delay. Once the court finds that the delay was unreasonable it must consider whether or not such delay can be condoned and in this regard the court exercises a judicial discretion.

See Wolgroeiers Afslaers v. Munisipaliteit van Kaapstad 1978(1) SA 13 (A) at 39C-D; Setsokosane Busdiens v. Nasionale Vervoerskomiessie en 'n Ander 1986(2) SA 57 (A) at 86C-E ;
Mathobonyane v. Vrystaaste Drankraad en 'n Ander 2000(4) SA 342 (0) at 347A-E;
Mamabolo v. Rustenburg Regional Local Council 2001(1) SA 135 (SCA) at 141I-J.

These decisions were decided on the basis of common law review and I can see no real difference in principle to the review in terms of section 145 of the Labour Relations Act 66 of 1995.

[6] Once there is an unreasonable delay, which may cause prejudice to other parties, the court or tribunal has a discretion to refuse to entertain the matter. It is incumbent upon the applicant who has delayed the institution of the proceedings to show that no one has been prejudiced thereby.

See: Mkhwanazi v. Minister of Agriculture & Forestry, Kwazulu 1990(4) SA 763(D & CLD) at **767H**.

If the applicant fails to adduce evidence of a satisfactory explanation of the delay he forfeits the right to complain.

[7] One of the reasons why the court will not interfere with the decision taken by the arbitrator who has refused to entertain a dispute that has been delayed is that the delay sometimes causes prejudice and, possibly, hardship and an invasion of vested interests to other parties. Most importantly, finality should be reached within a reasonable time in respect of judicial and administrative decisions.

See: **Radebe v. Government of the Republic of South Africa & Others 1995 (3) SA 787 (N) at 798B-D;**

Wolgroeiers Afslaers supra at 41D-E;

Bellochio Trust Trustees v. Engelbrecht NO and Another 2002(3) SA 519 (C) at 523F-G.

[8] In my view unless the applicant shows that the tribunal did not exercise its discretion judiciously the court will not interfere with its decision. It is not enough for the applicant merely to allege that the arbitrator did not apply his mind. There must be facts alleged to demonstrate that in reality the arbitrator did not apply his mind.

[9] Our courts have always kept a clear distinction between appeals and reviews. The review court is not concerned about whether or not the decision was right or wrong, fair or unfair, but is concerned with the manner in which the decisions are taken.

In **Davis v. Chairman, Committee of the JSE 1991(4) SA 43 (W) at 46H-I,** the principle was stated as follows:

"*The issue before this court on review is not the correctness or otherwise of the decision under review. Unlike the position in an appeal, this court of review 'will not enter into, and has no jurisdiction to express an opinion on, the merits of the administrative finding of a statutory tribunal or official, for a review does not as a rule import the idea of a reconsideration of the body under review.'*"

al so: **Governing Body, Tafelberg School v. Head, Western Cape Education Department 2000(1) S.A. 1209 (C) at 1219 B - C.**

In **Bel Porto School Governing Body v. Premier, Western Cape 2002(3) S.A. 265 (CC) at 291 par 85-86**, it was stated as follows:

"*For good reasons, judicial review of administrative action has always distinguished between procedural fairness and substantive fairness. While procedural fairness and the audi principle is strictly upheld, substantive fairness is held differently. As Corbett CJ said in* ***Du Preez & Another V Truth And Reconciliation Commission 1997(3) S.A. 204 (A) At 231 G,*** *(t)he audi principle is but one facet, albeit an important one, of the general requirement of natural justice that in the circumstances postulated the public official or body concerned must act fairly.... The duty to act fairly, however, is concerned with the manner in which the decisions are taken : it does not relate to whether the decision itself is fair or not."* (My underlining)

10] When a review is brought in a Court of law, the Court is not called upon to substitute its own decision for that of the tribunal. The Court will only inquire whether or not fundamental principles of natural justice have been violated and that the applicant appeared before an impartial tribunal. The Court will only interfere with the decision where there has been a violation of the enabling statute.

[11] A Court on review is concerned with irregularities or illegalities in the proceedings, which may go to show that there has been a failure of justice justifying interference by superior court.

[12] Applying the above principles I was constrained to look at grounds for review in this matter and not whether or not on the merits the condonation ought to have been granted. There is no allegation or evidence that the arbitrator did not exercise his discretion properly or that he exercised it capriciously or with an ulterior motive. I may mention, without

deciding, however, that the decision that the merits were very slim was not far fetched. However, the question that has to be decided before me is whether it can be said that the arbitrator has exercised his discretion capriciously or upon application of a wrong principle.

See**: Ex Parte Neethling and others 1951(4) SA 331 (A) at 335D-E**

[13] Before concluding the matter there is one aspect, which causes great concern in this, and some other matters that came before me. I am not in any way attempting to prescribe the manner in which papers should be drafted. The Rules of this court prescribe the manner in which papers should be drawn. See Rule 7. In terms of the Rules parties must set out their causes of action clearly and succinctly in a chronological manner. The review papers in this matter consisted of 243 pages. In my view this was a simple straightforward matter, which could hardly take 100 pages. It would have saved a lot of time and money if parties had refrained from attaching unnecessary documents, which neither advanced the case nor were they of any assistance to the court in any way. It is not enough to simply attach annexures without drawing the court's attention to the portions on which reliance is placed on these annexures.

See: Swiss Borough, Diamond Mines (Pty) Ltd and Others v. Government of the Republic of South Africa and Others 1999(2) S A 279(W) at 324G

In **Die Dros (Pty) Ltd & Another v. Telefon Beverages Cc & Others 2003(4) S.A. 207 (C) at 217 Par 28,** van Reenen, J expressed himself as follows:

"*It is trite law that the affidavits in motion proceedings serve to define not only the issues between the parties, but also to place the essential evidence before the Court, (See* ***Swiss Borough, Diamond Mines (Pty) Ltd & Others v.Government Of The Republic Of South Africa & Others 1999(2) S.A. 279 (W) at 323 G****) for the benefit of not only the court but also the parties. The affidavits in motion proceedings must contain factual averments that are sufficient to support the cause of action on which the relief that is being sought is based. Facts may be either primary or secondary. Primary facts are those capable of being used for the drawing of inferences as to the existence or non-existence of other facts. Such further facts, in relation to primary facts, are called secondary facts. (See* ***Willcox & Others V Commissioner For Inland Revenue 1960(4) S.A. 599 (A) at 602 A; Reynolds N.O. v. Mecklenberg (Pty) Ltd 1996(1) S.A. 75 (W) at 781.)*** *Secondary facts, in the absence of primary facts on which they are based, are nothing more than deponent's own conclusions (See* ***Radebe & Others v. Eastern Transvaal Development Board 1988(2) S.A. 785 (A) at 793 (C - E).)*** *and accordingly do not constitute evidential material capable of supporting a cause of action."*

al so: **National Director Of Public Prosecutions v. Philips & Others 2002(4) S.A. 60 (W) at 106 Par. 36.**

[14] In the instant case there was no need, for example, to attach annexure IDW2 which is a condonation application in the arbitration proceedings the contents of which were repeated in the application before this court. That condonation application (annexure IDW2) started at page 19 to 97. In view of the approach of applicant who adopted the style of rearguing the condonation application this served no purpose other than wasting everybody's time by reading such irrelevant material. Legal representatives must try to identify the issues to be decided and only place those issues for adjudication before the court. This would facilitate the proceedings and save a lot of unnecessary expenses. Otherwise the parties who persist in

including such irrelevant material must face the consequences of being ordered to pay costs, possibly, *de boni propriis,* should the point be taken.

In Michael v. Caroline's Yoghurt Parlour (Pty) Ltd 1999(1) S A 624 (W) at 635G it was stated that *" Compliance with Rules of Court facilitates the orderly disposition of litigation….It is also essential to enable Judges to prepare themselves in advance of argument"*. This dictum was said in a different context but is apposite here.

[15] On the part of the third respondent the answering affidavit was also not attractive. The respondent must set out his or her case chronologically and thereafter deal with the affidavit of the applicant paragraph by paragraph in a simple and short manner admitting or denying the allegations. Lengthy paragraphs ought to be avoided as reading of these may cause confusion and loss of the essence of the answer to the applicant's allegations. In some instances the whole page was filled with an answer consisting of one paragraph.

[16] Judges are often faced with heavy rolls and elimination of such irrelevant matter can greatly assist the judges, failing which legal representatives must indicate in their heads of argument which portions of the record need not be read. It does not help the parties to simply refer to decided cases regarding principles relating to condonation, which was also not relevant for purposes of deciding this review. The issue to be decided is not condonation but grounds for review. I sincerely hope that my sentiments will be taken cognizance of for future cases in order to assist other judges in disposing of such heavy rolls and that those who comply with the rules will ask for the striking out of the irrelevant matter with costs.

[17] Having found that the applicant has failed to show the grounds upon which the decision of the arbitrator may be reviewed and set aside I have come to the conclusion that the application must fail. Consequently I make the following order:

1. The application is dismissed with costs.

B R TOKOTA
ACTING JUDGE OF THE LABOUR COURT

DATE OF HEARING: 25 MARCH 2004

DATE OF JUDGMENT:

APPEARANCES: Applicant's Counsel Adv Landman instructed by Couzyns Inc.

Third respondent's Counsel Adv. Strydom instructed by Hofmeyr Herbstein & Gihwala Inc.