

IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO: C153/2003

DATE: 7-5-2004

In the matter between:

DAVID CATLIN Applicant

and

THE COMMISSION FOR CONCILIATION, First and Further

MEDIATION AND ARBITRATION & OTHERS Respondents

J U D G M E N T

NGCAMU, AJ:

1. At this point the Court is called upon to decide whether the application for condonation for the late filing of the supplementary affidavit should be granted. I have dealt with the application relating to the heads of argument and the amendment of the citation. That application was granted.

2. I now have to consider whether the application for condonation has to be granted. I have listened to the submissions made by the parties and I have also read the papers that have been filed with regard to this application. It is clear from the papers that the applicant first filed the documents, the review papers and thereafter filed a supplementary affidavit in June 2003. After that there was another supplementary affidavit that was filed on 2 February 2004 a long period of time had passed since the respondent had filed his opposing affidavit. The reason given by the applicant for the late filing of this supplementary affidavit is

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that he had been acting in this matter on his own and he did not have legal advice when drawing and filing the review application. However, it is clear that at the time when the matter was at the Commission for Conciliation, Mediation and Arbitration

("the CCMA") he had received legal advice, as he has already stated so in his papers. However, when the application for the review was filed, he did not receive any legal advice.

3. The applicant, however, goes further to tell the Court that in September 2003 he did receive legal advice. It was at that time that he was advised that he needed legal representation. However, nothing was done by the applicant in September when he received that advice. I must indicate that the applicant in his papers tells the Court that he was receiving informal legal advice. Although that has not been explained to the Court but I will accept that it means obtaining legal advice from a person who is an attorney or legally qualified without that person placing himself on record as representing the applicant in the matter.

4. I have indicated that the applicant did not file any papers after receiving legal advice in September 2003 and that nothing was done. I also assume that the person who gave the applicant legal advice in September had had a look at the papers that the applicant had filed and which was the reason why the applicant was then advised that legal representation was necessary.

5. In terms of the Act, the applicant can appear in court on his own and prepare papers on his own. There is no legal hindrance in this court for a person to prepare papers on his own and appear in court on his

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own. It was therefore the applicant's right also to prepare the papers and also appear in court on his own if he felt that he was able to prepare a set of papers and also appear in court. I now have to decide whether this explanation given by the applicant is acceptable and, if it is acceptable to the Court, then the Court can then look at other factors that are necessary for the granting of the condonation.

6. The Court has noted that it took the applicant about five months from September 2003 to January 2004 for the applicant to seek another advice and then

prepare the supplementary affidavit which he now wants the Court to permit. I must also indicate that there was no hindrance on the part of the applicant with regard to the seeking of legal advice between September 2003 and January 2004 when he finally was assisted in drafting the affidavit. It is not clear to the Court why during that period of time (that is the period of five months) he did not take any steps to seek advice and to correct the state of his papers. It was only in January that he then did something with regard to the application.

7. Now I have asked myself if this was an application for the condonation for the late filing of the review application, whether the explanation given by the applicant would be acceptable to the Court, i.e. if the applicant would say to the Court I did not have legal advice, I had no representation and therefore the Court should accept my explanation in coming late to the Court with my application. In my view, that explanation would not be acceptable to the Court. It therefore appears to the Court that the delay, at least from the period of September 2003 to January 2004, that period at least must have a reasonable explanation

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as to why, when the applicant had already been advised that legal representation was necessary in order to cure the defect in his papers, he did not take any steps. The Court does not know how it came about that he did not take any steps to cure the defects.

8. When looking at this affidavit, it appears to the Court that it introduces new grounds for the review application. I was referred to the matter of Milano Toyota v CCMA 1999 [6] BLLR 555 (LC). In paragraph 7 of this case the Court stated that the applicant's notice of motion and founding affidavit must contain all essential allegations upon which the applicant's cause of action is founded. In this matter, the applicant's papers had been drafted by lay people and they contained bald allegations against the commissioner. However, the Court took into account that these papers were prepared by lay people and accepted the papers. It was therefore submitted that the applicant in this present application is also a lay person and that

the Court should take that into account.

9. I do not know how those people in the Milano Toyota case were sophisticated, but in the present case I should mention that the applicant is not an illiterate person, although he can be regarded as a lay person who says that he is not trained in law. The applicant has chosen to conduct this case on his own and he has chosen to only approach the attorneys to get informal advice without actually getting the attorneys to attend to the matter. In the Court's view, the applicant was of the view that he was able to handle this case on his own and it is the Court's view that when the matter becomes difficult the applicant should not

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then complain and say he did not have any legal advice, he drafted the papers on his own.

10. It is difficult for the Court to accept that the applicant did not have any legal advice in this particular instance for the simple reason that in some steps that the applicant took he was able to obtain legal advice. In other words the applicant chose to obtain legal advice when it suited him and what counts really against the applicant in this application is that he was told in September of the state of his papers and that he had to obtain legal advice and legal representation and that was the stage that applicant should have taken some steps and not only come at a later stage to complain that the papers are defective because he acted on his own.

11. It was also submitted that the respondent is not going to be prejudiced if the application is granted and the affidavit admitted. Further, on the basis that this affidavit had been in the possession of the respondent for some period of time. However, there is nothing in law obliging the respondent to respond to that affidavit which was informally filed and there was no application for condonation at that stage, it was basically not a document which was formally before Court and therefore there was no obligation on the respondent to respond to it. However, even if the respondent had accepted that the document could be filed late, it was still the decision of the

Court to decide then whether or not this affidavit should be accepted in the light of the papers that have already been filed.

12. After considering all the issues that have been raised in this

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matter, I have come to the conclusion that the applicant has failed to give the Court a reasonable explanation for the delay in the filing of this application to supplement his papers. The Court does not accept the reason that has been given by the applicant and the reason for that is that it has always been open to the applicant to obtain legal advice, and he did get legal advice and there is no clear reason why this application was not done at an earlier stage and the affidavit was only filed in February when there was enough time on the part of the applicant. In the Court's view, the applicant was the author of his own misfortune and I have no reason why I should grant the application for condonation.

13. In the result the application for condonation for the late filing of the supplementary affidavit is dismissed with costs.

NGCAMU, A]