

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J518/06

In the matter between:

SOUTH AFRICAN CHEMICAL WORKERS UNION (SACWU)

1st Applicant

VELILE MTHWALO

2nd Applicant

and

HITRICON CC

Respondent

## JUDGMENT

FRANCIS J

1. This is an application to condone the late filing of the second applicant's statement of claim. The application was opposed by the respondent.
2. The second applicant was employed by the respondent as a driver. He was also a shop steward. On 30 September 2005 he was given a notice to attend a disciplinary enquiry. He was charged with the following misconduct:
  - 2.1 Poor and unruly behaviour;
  - 2.2 Undermining of authority: 28/09/05;
  - 2.3 Absence without permission;
  - 2.4 Failure to adhere to leave procedures..
3. The second applicant appeared at a disciplinary enquiry on 5 October 2005. He was

found guilty and was dismissed. The dispute was referred to the CCMA for conciliation on 18 October 2005. In his referral he alleged that he was dismissed for misconduct. The dispute was set down for conciliation on 16 November 2005. The respondent did not attend and a certificate of outcome was issued on the same day. On 21 November 2005 the dispute was referred to arbitration. The dispute was described as one concerning section 191(1) of the Labour Relations Act 66 of 1995 (the Act) in that it was a misconduct dispute.

4. The dispute was set down for arbitration on 27 January 2006. During the opening address the second applicant's representative contended that he was not guilty of the charges against him. Other employees of the respondent had not been charged for similar conduct. The respondent did not apply its code consistently. It took action only against certain people because they were leaders of the union. The commissioner then requested the representatives to address her regarding jurisdiction with reference to section 191(5)(b)(i) of the Act. She requested the parties to submit written submissions which they duly did. The applicants contended that the second applicant's involvement as an active union member in a leadership position was the true reason for his dismissal. The respondent submitted that the CCMA did not have jurisdiction to arbitrate the matter and that it would not consent to arbitration in terms of section 141 of the Act. The commissioner in an award dated 15 February 2006 found that the CCMA did not have jurisdiction in the matter unless the parties agreed to the jurisdiction of the CCMA in terms of section 141 of the Act. She then dismissed the matter.
5. The applicants on 7 April 2006 referred an automatic unfair dismissal dispute to this

Court for adjudication. The second applicant sought reinstatement. They also applied for condonation. The respondent filed a statement of response and opposed the application for condonation.

6. It is trite that misconduct disputes must be referred to the CCMA within 90 days from the date when the certificate of outcome was issued. Automatic unfair dismissal disputes must also be referred to this Court within 90 days from the date of the certificate of outcome. This Court may condone a late referral on good cause shown. Factors that the Court will take into account are the degree of lateness, the explanation for the lateness, the prospects of success and prejudice to the parties.
7. The automatic unfair dismissal dispute should have been referred to this Court within 90 days from 16 November 2005. The last day was 13 February 2006. It was only referred on 7 April 2006. It was therefore 53 calendar days late. The period is substantial. Mr Holliday who appeared for the respondent contended had the applicants referred the dispute to this Court within 30 days of the date of the award it would have been reasonable.
8. The reasons given for the delay are clear. The dispute arose on 5 October 2005 and was referred timeously to the CCMA on 18 October 2005. The dispute was set down for conciliation on 16 November 2005. The respondent was absent and a certificate of outcome was issued on the same day. The applicants referred the dispute to the CCMA for arbitration on 25 November 2005. This was also made well within the prescriptive ninety day period. The matter was set down for arbitration on 27 January 2006. During

the applicants opening address, it became clear to the commissioner that the CCMA might not have jurisdiction to arbitrate the dispute. The respondent required the applicants to withdraw the statements relating to automatic unfair dismissal. The applicants were not prepared to do so and the commissioner requested both parties to file their written arguments relating to the CCMA's jurisdiction. The respondent contended in its written submissions that the CCMA lacked jurisdiction, there was no consent to arbitration and that the applicants should refer the matter to this Court for adjudication. The commissioner then issued an award on 15 February 2006 and dismissed the referral for lack of jurisdiction. The award was received by the applicant on 1 March 2006. Had the commissioner issued the award on 27 January 2006 the applicants would still have been on time to have referred the dispute to this Court in terms of section 191(5)(b)(i) of the Act.

9. It is so that the applicants have not given any explanation to this Court why the referral was not made soon after they had received the award. This is however not fatal to their case since they have always acted with the necessary haste when the dispute arose. Their referrals to conciliation and arbitration were made timeously. The delay in setting the matter down for arbitration and the issuing of the award was a factor beyond their control. It would appear that they had laboured under a belief that they still could refer the dispute within 90 days from the date of the award. Had the commissioner not raised the issue of jurisdiction with the parties the matter would probably have been decided by the commissioner. Had the respondent consented to the CCMA's jurisdiction in terms of section 141 of the Act there would not have been any need to have applied for condonation. I am therefore satisfied that the delay has been explained adequately.

10. When it relates to the issue of prospects of success, all that an applicant must show is that it has some good prospects of success in the matter. I do not want to deal in great detail with the issue of prospects of success since I am mindful that there is a factual dispute about what had led to the second applicant's dismissal. This is an issue that the trial court must decide and will do so after it has heard evidence in this regard. I am satisfied that the applicants have placed sufficient facts before me that shows that they have some prospects of success in the matter.
11. Nothing turns much around the issue of the requirement of prejudice. It is clear from the papers that the second applicant will suffer greater prejudice if he is not granted condonation.
12. The application stands to be granted.
13. I do not believe that this is a matter where costs should follow the result. An appropriate order is not to make any costs order.
14. In the circumstances I make the following order:
  - 14.1 The late referral of the Statement of Claim is condoned.
  - 14.2 There is no order as to costs.

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR APPLICANTS : X NGAKO OF RUTH EDMONDS ATTORNEYS

FOR RESPONDENT : ML HOLLIDAY EMPLOYER'S ORGANISATION  
OFFICIAL

DATE OF HEARING: 3 MAY 2007

DATE OF JUDGMENT : 18 MAY 2007