IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN JOHANNESBURG)

CASE NUMBER: JR1354-03

In the matter between:

COMMUNICATION WORKERS UNION	**APPLICANT**
MK CHABANGU & 4 OTHERS	**2ND TO 6TH APPLICANTS**

and

THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**FIRST RESPONDENT**
ERIC LOUW	**SECOND RESPONDENT**
SA POST OFFICE LIMITED	**THIRD RESPONDENT**

JUDGEMENT

AC BASSON, J

1] The Applicants in this matter seek to review and set aside a ruling made by the Second Respondent dated 18 December 2002, in which the Second Respondent (hereinafter referred to as "the Commissioner") ruled that the First Respondent (hereinafter referred to as "the CCMA") lacked jurisdiction to arbitrate the unfair dismissal dispute between the individual Applicants because, in his view, the individual Applicants were, to "a large extent", dismissed for participation in an unprotected strike rather than for ordinary misconduct. The Commissioner concluded that the matter should therefore be referred to the Labour Court for adjudication.

CONDONATION FOR THE LATE FILING OF THE REVIEW APPLICATION

2] The application to review was brought in terms of section 158 of the Labour Relations Act 66 of 1995 ("the LRA"). Although the LRA does not prescribe any time period within to launch review applications in terms of this section, the Labour Court has accepted that review proceedings brought in terms of section 158 must be launched within a reasonable time. The Labour Court has held in numerous decisions that a period of six weeks from the date of the decision or conduct sought to be reviewed, is a reasonable period within which the launch

a review application.

3] The Applicant brought a condonation application which was unopposed. The following appears from the founding affidavit: The arbitration ruling was faxed to the union's offices on 6 January 2003. The review application was only filed on 11 August 2003. According to the founding affidavit filed in support of the condonation application, a letter was sent to the union's head office in terms of which head office was requested to seek a legal opinion on the prospects of successfully reviewing the ruling. The individual Applicants had informed a certain Jeffery Fundama (who was the union official responsible for the matter) that they had approached the Legal Aid Board regarding this matter and that the Legal Aid Board had agreed to take this matter on review on their behalf. The individual Applicants therefore terminated the mandate of the union to proceed with the matter. The individual Applicants believed that the Legal Aid board would launch the review application within the required period. In April 2003 the Legal Aid Board advised the individual Applicants that it was no longer prepared to launch the review application on their behalf and the union was again approached. The union representing the individual Applicants then instructed the present attorney. Although the attorneys were

seized with the matter since May 2003, the papers were only filed on 11 August 2003.

4] On behalf of the Applicants it was argued that the individual Applicants have taken all the steps that they had believed were necessary to ensure that the review application was launched within a reasonable time and that condonation should therefore be granted.

5] Although the delay in bringing this application to review is lengthy and the explanation for the delay not entirely satisfactory, it is nonetheless acceptable when regard is had to all the relevant factors. In *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (AD)[1] the Court sets out at page 532B–E the factors that must be taken into account when considering a condonation application: The court will take into account the degree of lateness; the explanation therefore; the prospects of success on the merits; the importance of the case; and other considerations. These factors are interrelated and should not be considered separately. The approach in the *Melane*'s case has been followed with approval in various decisions of this Court and the Labour Appeal Court. In *NUM v Council for Mineral Technology* [1999] 3

---

1 "*In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant is the degree of lateness, the explanation therefore, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interests in finality must not be overlooked.*"

BLLR 209 (LAC) at paragraph [10] the Labour Appeal Court held that the absence of a reasonable and acceptable explanation for the delay was pertinent to the enquiry into whether or not condonation should be granted. Where no such an explanation is forthcoming, no examination of the prospects of success needs to be undertaken (see also *NUM and others v Western Holdings Gold Mine* (1994) 15 *ILJ* 610 (LAC) at 613E and *Waverley Blankets Limited v Sithukuza and Others* (1999) 20 *ILJ* 2564 (LAC) paragraph [11]). If an applicant for condonation does not explain the default or tender an unsatisfactorily explanation, condonation will not be granted (see *Ferreira v Ntshingila* 1990 (4) SA 271 (A)). The mere fact that a party has decidedly strong prospects of success is not in itself sufficient cause to grant condonation. (See *Torwood Properties (Pty) Ltd v SA Reserve Bank* 1996 (1) SA 215 (W) at 230H and *Chemical Energy Paper Printing Wood & Allied Workers Union & Others v Metal Box t/a MB Glass* (2005) 26 ILJ 92 (LC).)

6] It is clear from the aforegoing that this Court endorses the approach that condonation for non-compliance with time limits should not be granted lightly. Where the blame may be attributed to the negligence of an attorney or representative, the Courts will equally be reluctant to grant condonation except in exceptional circumstances. Factors that will be taken into account is the fact that an applicant is a layman from a rural environment; the fact that an applicant was misled by his or her representative; the fact that the applicant had taken reasonable steps to ensure that his or her matter is being pursued; or where the refusal of condonation will result in the failure of justice.[2] I have considered

2 See in general: *Swanepoel v Albertyn* (2000) 21 ILJ 2701 (LC); *NEHAWU obo Mofokeng & Others v Charlotte Theron Children's Home* [2004] 10 BLLR 979 (LAC)

all of these factors and despite the fact that the explanation is not entirely satisfactory it is nonetheless reasonable and acceptable. If regard is had to the prospects of success and the potential prejudice and injustice which the individual Applicants will suffer if condonation is not granted, I am satisfied that condonation for the late filing of the review application should be granted.

LATE FILING OF THE ANSWERING AFFIDAVIT

7] The application for review was unopposed when it was first to be considered by this Court: Despite the fact that the Respondents were notified in terms of the Rules of this Court of the date of set-down, the Third Respondent did not file any opposing papers. The Third Respondent appeared in Court on the day of the hearing and opposed the application resulting in the postponement of the hearing. The Third Respondent has since filed its answering affidavit. The Third Respondent has, however, not filed an application for condonation for the late filing of its answering papers.

8] It appears from the papers that the Applicant has filed its notice in terms of Rule 7A(8) of the Rules as far back as 22 April 2004. The

Third Respondent's affidavit was filed on 11 April 2006. The Third Respondent therefore filed its answering affidavit approximately two years late. In the absence of a condonation application, the answering affidavit is therefore not properly before this Court and I have therefore proceeded to consider the matter without any regard to the Third Respondent's papers.

THE RULING

9] The individual Applicants were employed as mail handlers by the Third Respondent (hereinafter referred to as "the Post Office") until their dismissal on 23 April 2002. On 12 April 2002 the individual applicants were given charge sheets and called upon to attend a collective disciplinary hearing. The Applicants were collectively charged with poor time keeping; delaying of mail; violence and refusing to carry out an instruction. They were dismissed following a disciplinary hearing.

10] The individual Applicants referred a dispute about their unfair dismissal to the CCMA. In the referral the reason for the dismissal is indicated as "misconduct". The matter could not be resolved and was referred to arbitration. At the commencement of the arbitration, the

Commissioner intimated of his own accord that he was of the view that the CCMA did not have jurisdiction on the grounds that the individual Applicants' were dismissed for participation in a "*wildcat strike*". No evidence was led in this regard.

11] The Commissioner thereafter issued a ruling in terms of which he ruled that the CCMA did not have jurisdiction and that the matter should be referred to the Labour Court. In the Ruling the Commissioner points out that there were *"indications*" that the dismissal was for a *"wildcat strike"* rather than dismissal for misconduct and that both parties had agreed that such indications existed and that the matter should be referred to the Labour Court. The Commissioner concluded as follows:

> "Prior to the start of the arbitration proceedings the parties submitted various documents which they intended using in support of their respective cases. A reading of those documents clearly indicated that there were various indications that the members of the applicant were perhaps and to a large extent dismissed for participating in unprotected industrial action which, at some stage at least, occurred in the form of a so-called wildcat strike rather than mere misconduct

> in the strict sense of the word. Both parties agreed that such indications exist and that the matter should be referred to the labour court for adjudication."

12] The deponent to the founding affidavit, a one Mr. Fundama, who is the full time shopsteward of the Communication Workers' Union (hereinafter referred to as "the CWU") at the SA Post Office, states that he was present at the arbitration hearing and that no agreement was reached between the parties to the effect that there were "*indications*" that the individual Applicants were dismissed for participation in an unprotected strike and that the mater should be referred to the Labour Court.

13] It was therefore submitted on behalf of the Applicants that the Ruling should be reviewed, *inter alia*, on the basis that the Commissioner had failed to apply his mind properly to the issues before the arbitration and had taken into account an alleged agreement that had not been reached.

14] This review hinges on two points. Firstly, the question whether or not an agreement was reached in terms of which it was agreed between

the parties that the dispute related to a dismissal on the basis of misconduct or whether or not the issue to be determined was in respect of an unprotected strike action. Secondly, whether there were "*indications*" that the dismissal was for unprotected industrial action as opposed to misconduct. The Applicants allege that the Commissioner had misdirected himself in describing the referral as one pertaining to "*an unprotected industrial action"* instead of one dealing with "*misconduct*" and that it is clear from the papers that the individual Applicants were never charged with participation in an unprotected industrial action. Furthermore, no evidence was led during the disciplinary hearing that they were engaged in unprotected strike action. It was also submitted that the dispute that was referred to the CCMA was on the ground that the reason for the dismissal was *"misconduct"*.

REVIEW

15] A Commissioner is enjoined to determine the "*real*" or "*true*" nature of the dispute that was referred to the CCMA. See in this regard *Wardlaw v Supreme Mouldings (Pty) Ltd* (2007) 28 ILJ 1042 (LAC) where the Labour Appeal Court pointed out that, although the

"formalistic school" of thought - which holds that the jurisdiction of a forum is determined by the reason for the dismissal as alleged by the employee, has merits, the substantive school of thought which holds that the Labour Court has jurisdiction only provisionally until it has made a finding as to what the true reason for the dismissal is - is the

correct approach.[3] Up until this decision, the Labour Court was divided on the issue whether it is the employee who designates the nature of the dispute or whether it is the actual forum that should determine the nature of the dispute. This controversy has now been clarified. The Labour Court (and by implication the CCMA

3 "[21] In the light of all of the above the conclusion is inescapable that the formalistic school of thought is not one that enjoys the recognition of the Act. The substantive school of thought is the one that is very close to the school of thought that enjoys that recognition. We say this because s 157(5), read with s 158(2), clearly envisages a situation where the Labour Court initially takes as correct the employee's allegation of what the reason for dismissal is and proceeds with the process of hearing the matter until it is 'apparent' to it that the reason for dismissal is a different one and it is one falling under s 191(5)(a) . In such a case s 158(2) is triggered. Once it is apparent to the court that the dispute is one that ought to have been referred to arbitration, the court deals with the matter in terms of either s 158(2)(a) or (b) . It cannot deal with it outside the ambit of those provisions. Accordingly, it has no power to proceed to adjudicate the dispute on the merits simply because it is already seised with the matter. To do so would be in conflict with the provisions of s 157(5) and 158(2) of the Act.

[22] A question that arises from s 158(2) is: when does it become apparent to the Labour Court that a dispute is one that ought to have been referred to arbitration? To answer this question within the context of a dismissal dispute, it is necessary to bear in mind the provisions of s 191(5)(a) and (b) . In terms of those provisions the employee's allegation of what the reason for dismissal is provisionally channels the dispute to either arbitration or adjudication after conciliation has failed. Where the employee alleges that he does not know the reason for the dismissal, the dispute is channeled to arbitration. An unfair labour practice dispute is also required to be referred to arbitration.

[23] The significance of s 191(5)(a) and (b) seems to be this. What is contemplated by the scheme of the Act is that, if the employee has alleged a certain reason as the reason for dismissal and that reason is one that falls within s 191(5)(b) and the court does not at any stage think that that reason is not the reason for dismissal, the court proceeds to adjudicate the dispute and delivers a judgment. Where as a reason for dismissal the employee has alleged a reason that falls within s 191(5)(b), the court provisionally assumes jurisdiction but, if the court later takes the view or it later becomes 'apparent' to the court that the reason for dismissal is one that falls under s 191(5)(a), it then declines jurisdiction and follows the s 158(2)(a) or (b) route.

[24] In the light of the above it seems to us that the employee's allegation of the reason for dismissal as contemplated in s 191(5) is only important for the purpose of determining where the dispute should be referred after conciliation but the forum to which it is referred at that stage is not necessarily the forum that has jurisdiction to resolve the dispute on the merits finally. That may depend on whether it does not later appear that the reason for dismissal is another one other than the one alleged by the employee and is one that dictates that another forum has jurisdiction to resolve the dispute on the merits. Once a dispute has been referred to, for

Commissioner) must determine the true nature of the dispute irrespective of the characterization of the dispute in the referral form. See also *Future Mind (Pty) Ltd v CCMA & Others* [1998] 11 BLLR 1127 (LC) where the Court pointed out that arbitrators are obliged to determine the real issue in dispute when considering jurisdiction. Where there is uncertainty as to whether the CCMA (or the Labour Court) has jurisdiction to hear a matter, the CCMA must determine the issue and in doing so may well have to hear sufficient evidence in order to identify the true reason for the dismissal if it is not possible to determine this question in light of, for example, documentation or even the opening statements of the respective parties. If it then appears that the dispute was erroneously referred to the CCMA, then only may the arbitrator with the consent of the parties proceed with the matter. If such consent cannot be obtained, then the matter should be referred to the Labour Court.

16] In respect of the present (jurisdictional) ruling two points should be made: Firstly, it appears from the award that the Commissioner was of

---

example, the Labour Court, the Labour Court provisionally assumes jurisdiction. That assumption of jurisdiction is conditional upon its not later becoming 'apparent' to the court within the contemplation of s 158(2) of the Act that the reason for the employee's dismissal is one that falls within s 191(5)(a) of the Act. We say it is provisional or conditional because if it later becomes 'apparent' that the dispute is one that ought to have been referred to arbitration, the court will decline jurisdiction and have the dispute referred to arbitration."

the view that, where parties agree that a dispute should be referred to the Labour Court because there are such "*indications*", then the matter should be referred to the Labour Court. This is clearly a misconception of his duties as an arbitrator. It is the duty of the Commissioner to determine the true nature of the dispute not the parties. At best the parties can consent to the jurisdiction of the CCMA where it appears that because of the nature of the dispute the CCMA does not have jurisdiction. The referral form and the characterization of the dispute therein will likewise not be conclusive in determining the true nature of the dispute. Where doubt exists, the Commissioner must, if necessary, hear evidence before a proper determination of the true nature of the dispute is made. In so far as the Commissioner had relied on an agreement (the existence of which the Applicant disputes), the Commissioner's award should be reviewed and set aside. Secondly, in so far as there are "*various indications that the members of the applicant were perhaps and to a large extent*" dismissed for participation in unprotected strike action, I am also of the view that the award should be reviewed and set aside. A perusal of the charge sheet reveals that the employees were charged with: (i) poor time keeping; (iii) delaying of mail; (iii) violence; and (iv) refusal to carry out an instruction. These charges, on the face of it, point to *"misconduct*".

In so far as the Commissioner was of the view that there were indications that the applicants were dismissed for participation in a strike, he certainly could not have made such a deduction purely with reference to the charge sheet or to the minutes of the disciplinary hearing. A perusal of the Chairperson's guilty finding also does not support a conclusion that the individual Applicants were dismissed for participation in unprotected strike action. In fact, it appears that the Chairperson was of the view that the individual Applicants were guilty because they had refused to take instructions which conclusion, on the face of it, appears to be a guilty finding on a charge of misconduct: *"According to the leading evidence(sic), after listening carefully I find them guilty and (sic) the two charges, as they decided not to do the walks, it was clear that they refused to take instructions.*" In light of the documents that were placed before the Commissioner, the Commissioner's conclusion in respect of the true nature of the dispute is clearly not rational and therefore falls to be reviewed and set aside.

17] The matter is accordingly referred back to the CCMA to be enrolled for arbitration. Should the evidence later reveal that the true nature of the dispute is one that falls within the jurisdiction of the Labour Court then so be it. If that happens, the Commissioner will then either have to

suspend the proceedings and refer the matter to the Labour Court or seek the consent of the parties to continue adjudicating the dispute that falls within the jurisdiction of the Labour Court. In respect of costs I make no order.

18] In the event, the following order is made:

1. The application for the late filing of the review application is granted.
2. The Ruling made by the Second Respondent sitting as a Commissioner of the First Respondent, dated 18 December 2002, is reviewed and set aside.
3. The matter is referred back to the First Respondent for arbitration before a different Commissioner.
4. There is no order as to costs.

_____

AC Basson, J

Date of Hearing: 13 June 2007
Date of Judgement: 18 April 2008

For the Applicant: O Mooki

For the Respondent: R Phungo Inc