IN THE LABOUR COURTS OF SOUTH AFRICA

(HELD AT BRAAMFONTEIN)

CASE NR: JR1010/07

In the matter between

SECURITY PATROL EXPERTS CC **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

COMMISSIONER KC MOODLEY **Second Respondent**

LYLE DENNIS NESBITT **Third Respondent**

JUDGEMENT

AC BASSON, J

This was an application in terms of section 158(1)(g) of the Labour Relations Act ("the LRA") to review and set aside a jurisdictional ruling handed down by the Second Respondent (hereinafter referred to as "the Commissioner") on 17

January 2006 under case number GAJB6062/05. The Applicant also applied for condonation for the late filing of the review application.

The Applicant seeks to review the jurisdictional ruling on the following grounds: Firstly that the Commissioner had committed a material error of law and thereby a gross irregularity in the conduct of the proceedings in concluding that the Third Respondent (hereinafter referred to as "Nesbitt") was an employee of the Applicant. Secondly, the Commissioner had failed to properly apply his mind to the relevant evidence and considerations placed before him and thereby exceeded his powers as a Commissioner in concluding that the CCMA had the necessary jurisdiction to arbitrate the dispute between the Applicant and Nesbitt. More in particular, it was submitted that the Commissioner (i) failed to consider the oral evidence and the written argument led by the Applicant's representative; (ii) failed to consider the documents submitted by the Applicant in support of the point *in limine*; (iii) unduly delayed the ruling. Argument was heard on 4 August 2005. The ruling was only made on 17 January 2006.

POINTS *IN LIMINE* BEFORE THE CCMA

At the commencement of the proceedings before the CCMA on 4 August 2005 the Applicant raised two points *in limine:* (i) Firstly, the CCMA had no jurisdiction to preside over the matter as Nesbitt (the Applicant before the CCMA) was not an employee of the Applicant. (ii) Secondly it raised the point that should the CCMA rule that Nesbitt was an employee of the Applicant, the

CCMA had no jurisdiction as the termination of the relationship between the parties was based on operational requirements affecting a number of employees. No oral evidence was led in support of the points *in limine* and the points *in limine* were dealt with with reference to the written submissions submitted on behalf of the respective parties.

Condonation application

Before turning to the merits of the review, it is necessary to first consider the application for condonation for the late filing of the review application.

It is common cause that the CCMA only issued its ruling on 17 January 2006 despite the fact that the Commissioner had heard argument in respect of the points *in limine* as far back as 4 August 2004. The Applicant alleges in its papers that it only became aware of the ruling when it attended the arbitration hearing on 22 March 2007 and that it therefore applies for condonation to the extent that is necessary. No explanation for the delay is tendered, no indication of the length of the delay is tendered nor is any explanation tendered in respect of the steps that the Applicant and/or his representative took in order to ascertain whether an award was issued by the Commissioner. In all respects the application for condonation is defective and should be dismissed on this basis alone. I will return to these points hereinbelow.

As already pointed out in the aforegoing paragraph, there is very little before this Court in respect of the circumstances or reasons for the delay as the Applicant merely applies for condonation to the extent that it may be

necessary. The heads of argument filed on behalf of the Applicant also fail to deal with the aspect of condonation. The supplementary affidavit and the replying affidavit filed on behalf of the Applicant also do not take the matter any further.

Nesbitt disputes the allegation that the Applicant only became aware of the ruling of the Commissioner on 22 March 2007 and places the following facts before the Court:

(i) Even if the First Respondent ("the CCMA") did not fax the award to the Applicant, the previous attorney of record faxed a copy to the Applicant's employer's organisation on 24 January 2006. This is confirmed by the transmission report which also confirms that five pages were successfully transmitted.

(ii) On 24 January 2006, the previous attorneys also faxed through the award to the Applicant's offices. This is also confirmed by the transmission report. The transmission report further confirms that five pages were successfully transmitted to the Applicant.

(iii) A letter was addressed to the Applicant's employer's organisation on 26 June 2006. In this letter reference is specifically made to the existence of the arbitration award.

(iv) The Applicant's employer's organisation replied on 28 June

2006 confirming receipt of the letter dated 26 June 2006. It is instructive that this letter does not state that the award has not been received by the employer's organisation. It does not even express surprise as to the existence of such an award.

(v) On 15 September 2006, after the Applicant's employer's organisation's mandate was terminated, Nesbitt's attorney wrote directly to the Applicant and raised the issue of previous correspondence.

It is, in my view, clear from the papers and the facts set out in the previous paragraph that the Applicant and its representatives were aware of the award in January 2006. At the latest, they should have been aware of the award in February 2007. In an urgent application launched to postpone the further arbitration hearing of the matter, the Applicant concedes that the CCMA (on 14 February 2007) issued a further date for the arbitration hearing (22 March 2007). It is indeed strange why the Applicant had made no enquiries as to the outcome of the point *in limine* at that stage. In fact, no explanation is tendered as to why no enquiries were made between 14 February 2007 and 22 March 2007. What is particularly strange about the circumstances is the fact that the Applicant should have known that the point *in limine* must have been dismissed by the Commissioner hence the notice of set down for the arbitration. Put differently, if the point *in limine* was upheld, in other words, if the Commissioner had upheld the point that Nesbitt was not an employee, a notice of set down for the arbitration would not have been issued.

In the replying affidavit the Applicant merely denies the allegations and states that the letters and proof of telefaxing were not conclusive proof that they were received. In respect of the replying affidavit, it must, however, be pointed out that the replying affidavit is out of time. No application for condonation has been filed in respect of the replying affidavit.

It is trite that in order for an application to be properly before this Court, it has to be brought timeously. Where an application is not brought timeously, the review application should be accompanied by an appropriate application for condonation for the late filing thereof. It is also trite that an application for condonation should comply with the requirements for such an application for condonation as set out in *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (AD):

> "*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."

In the founding affidavit the Applicant merely alleges that it only became aware of the award on 22 March 2007 which is the day on which the arbitration was set down. The supplementary affidavit does not take the matter any further nor does the replying affidavit. It is trite that the founding affidavit must deal with the various considerations necessary in order to substantiate an application for condonation. They are: the degree of lateness; the explanation therefore; the prospects of success on the merits; the importance of the case; and other considerations. None of these considerations are addressed in the founding affidavit, the supplementary affidavit nor in the replying affidavit (although I must point out that a case must be made out in the founding affidavit or, at the very least, the supplementary affidavit). Not even the heads or argument deal with the issue of condonation.

In light of the aforegoing, the application for condonation is dismissed. I can find no reason why costs should not follow the result.

JR1010/07

ORDER

The application for condonation is dismissed with costs.

……..……..

AC BASSON, J

Date of judgement: 14 January 2009

For the Applicant: Blake Bester Inc

For the Third Respondent: Adv MA Lenox instructed by Dogulin Shapiro & Da Silva Inc