REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no C 347/2012

In the matter between:

VELISWA JUSTICE TOM	**APPLICANT**
and	
PHSDSBC	**1ST RESPONDENT**
COMMISSIONER L MARTIN	**2ND RESPONDENT**
DEPT OF HEALTH	**3RD RESPONDENT**
MINISTER OF HEALTH	**4TH RESPONDENT**

Application heard: 25 October 2013

Judgment delivered: 29 October 2013

JUDGMENT

VAN NIEKERK J

[1] This is an application to review and set aside a ruling made by the second respondent (the commissioner). In his ruling, the commissioner refused to condone the late referral of a dispute referred by the applicant to the first respondent.

[2] The applicant was employed by the third respondent until his dismissal for misconduct on 6 July 2011. His union (HOSPERSA) referred a dispute to the bargaining council on 19 October, 42 days late. An incomplete application for condonation was submitted with the referral. A complete application served before the bargaining council only on 13 February 2012, 189 days after the date of dismissal. The applicant's representative had been involved in a motor accident on 13 September 2011, which explained some of the delay, although the relevant time limits had already expired by that date. On his own version, the dispute was referred only on 19 October (after the matter had been taken over by another union official). That official became aware on 17 November that the application was incomplete. There is no explanation for the delay between that date and 13 February, when the application was fully and properly served.

[4] All of these issues are recorded in the commissioner's ruling, and resulted in his conclusion (which was not seriously contested in these proceedings) that the delay was unacceptable and that the explanation for the delay was inadequate.

[5] Regarding the applicant's prospects of success, the commissioner observed that the applicant had been dismissed on two charges. The first was one of theft, which the applicant addressed in the application for condonation. The second was a charge of leaving the workplace without permission, which the applicant had failed to address. On this basis, the commissioner held that while there were prospects of success in relation to the first charge, there were none in relation to the second. The commissioner held:

> "32. While the applicant may have a reasonable chance of succeeding on the first charge I am of the view that this is not sufficient to conclude that this

> application for condonation should succeed. The excessiveness of the delay in the referral militates against this."

On that basis, the application was dismissed.

[6] The test to be applied is that enunciated by the Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd*, recently affirmed by the Supreme Court of appeal in *Herholdt v Nedbank* . In the latter judgment the court summarised the position as follows:

> '[25] In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145 (2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145 (2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'

[7] This formulation admits the remedy of review in only the most exceptional circumstances. It is not for this court to decide whether the commissioner was correct- a commissioner is allowed to be wrong. Provided the outcome is reasonable, the commissioner is also allowed to commit mistakes of fact and law. Similarly, whether the commissioner in the exercise of his discretion placed too much or too little emphasis on some factors or accorded some factors too much or too little weight, is not ordinarily relevant. In the present instance, the commissioner applied the correct test and came to a conclusion that cannot be said to be so unreasonable that no reasonable decision-maker could come to it on the available material.

[8] To the extent that the applicant relies on the fact that the commissioner's view on his prospects of success is the basis for a review (and in particular that absence

from the workplace is not in itself a dismissible offence), while it is correct that the commissioner too into account only the fact that the applicant had not articulated his defence in this regard, the underlying legal principle is one that places no premium on the prospects of success where an applicant (such as the applicant in the present instance) has manifestly failed to provide an acceptable explanation for a significant period of delay (see *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC)).

[9] For these reasons, the application stands to fail.

I make the following order:

1. The application is dismissed.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

APPEARANCE

For the applicant: Ms. Des Fountain