IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

JA36/07

In the matter between:

SOUTH AFRICAN BROADCASTING CORPORATION LTD	**Appellant**

and

THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**First Respondent**
H.MURGUGAN N.O.	**Second Respondent**
CWU obo BREDENKAMP K, & 3 OTHERS	**Third Respondent**

JUDGMENT

WAGLAY ADJP

[1] In this judgment I have referred to the Chemical Workers Union and its 4 members collectively as the respondent, individually they are referred to as the "Union" and the "grievants".

[2] On 8 September 2005 the Union referred its dispute with the

Appellant to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation. The dispute was lodged on behalf of the 4 grievants. The dispute was described as failure or refusal by the appellant to promote or upgrade the grievants and thus committing, *inter alia*, (i) an unfair labour practice as defined in s186(2)(a) of the Labour Relations Act no 66 of 1995, as amended (the Act); alternatively,(ii) discrimination as set out in s6 of the Employment Equity Act no 55 of 1998 on the grounds of qualification and expertise.

[3] In its "summary of facts" attached to the referral for conciliation, the Union recorded that the appellant had in 1998 promoted or upgraded three artisans from a salary scale of 403 to a salary scale of 300 as part of a skills retention plan while the grievants who performed the same or similar work and have similar or better qualifications were not similarly promoted or upgraded. The Union also recorded that the result it hoped to achieve at the conciliation was: *to obtain promotion or upgrading of the individual applicants* [grievants] *to the salary scale of 300 with immediate effect; and,* "*reasonable and just compensation, including back pay for loss of benefits and salary*". The union furthermore recorded in its referral that the dispute was "*ongoing*".

[4] The CCMA was unhappy with the referral it received and wrote to the Union stating that it (CCMA) had no jurisdiction to deal with the dispute because the Union had not indicated a "*dispute date*" on the

form.

[5] A number of telephone calls and letters then followed from the Union's attorneys to the CCMA. The attorneys explained that the unfair labour practice complained of by the Union was described as *ongoing* because every month that the grievants were treated differently to the other employees performing the same or similar duties for the appellant the unfairness was being repeated. The CCMA was also advised that although the factual position had obtained over a period of years, the history of the dispute was irrelevant because the unfairness continued every month. The CCMA was told that insofar as the claims of unfair labour practice and unfair discrimination were concerned the Union and the grievants were willing to limit their claims to the date that fell within the period that would give the CCMA jurisdiction to conciliate the dispute.

[6] The CCMA then set down the dispute for conciliation on 23 January 2006. At the conciliation the appellant argued, without tendering any evidence, that the CCMA did not have jurisdiction to conciliate the dispute because: (i) the dispute arose in 1998 when the 3 artisans were promoted or upgraded; and (ii) the dispute was resolved by reason of the fact that a grievance was lodged against the said promotion or upgrading on 17 March 2004 and dealt with on 8 April 2004.

[7] The appellant took the view that the dispute, when referred to the CCMA for conciliation, was over seven years old and should not and

could not be entertained by the CCMA without the respondent seeking and being granted condonation for referring the dispute years after it had arisen. The Union and the grievants on the other hand maintained that because the dispute was ongoing and the relief they sought was limited in terms of time to the period which fell within the CCMA jurisdiction, the referral was not out of time and there was thus no need to apply for condonation. The Union also argued that it only became aware of the unfair labour practice in August 2005 and its referral was therefore timeously made.

[8] After hearing argument from the parties the commissioner made the following ruling:

> *"Having considered the arguments of both parties I rule that there is no need for a condonation application because the Union only became aware in August 2005 of the Unfair Labour Practice which falls within the prescribed 90 day period for such [an] application."*

[9] Having ruled on the issue of jurisdiction the commissioner issued a certificate of outcome of the dispute that recorded the agreement between the appellant and the Union. The certificate records the following:

> *"By agreement between the parties this dispute will be referred to the Labour Court."*

[10] On 21 April 2006 the respondent served its Statement of Case upon

the appellant in respect of the dispute. On 17 May 2006 the appellant filed its Statement of Opposition. Two weeks after filing its Statement of Opposition the appellant launched an application to review and set aside: (i) the ruling made by the commissioner on 23 January 2006; and, (ii) the certificate of outcome issued by the commissioner on the same day. The commissioner was cited as the second respondent in the matter.

[11] The appellant set out three grounds upon which it contended that it was entitled to the relief it sought. The grounds were set out thus:

> *"14.1.1 The second respondent ignored the fact that the referral was seven (7) years late and was not accompanied by a condonation application. The second respondent simply finds that there was no need for condonation application because the union only became aware of the alleged dispute in August 2005, which fell within the period of 90 days*
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> *14.1.2 The second respondent failed to consider the evidence placed before him, that the alleged dispute arose in 1998 and that the applicants were members of (BEMAWU) the Broadcasting, Electronic, Media and Allied Workers Union at that stage.*
>
> ***14.1.3** Furthermore the second respondent failed to consider the*

> *applicant's undisputed evidence that it is entitled to finality in disputes referred against it. Seven years was excessive especially when regard is had to the fact that no condonation for the late referral of the alleged dispute was sought. The second respondent clearly ignored the applicable legal principles and made an unjustified ruling. This constitutes a material misconduct and gross irregularity."* **(my emphasis)**

[12] The respondent opposed the application on the grounds that it was without any merit and also took the point that the application to review was made outside the prescribed period as provided in the Act. About a week after the appellant received the respondent's opposing papers it lodged an application to condone the delay in bringing its review application.

[13] In the affidavit supporting the application for condonation, the appellant submitted that the application was late by some two and a half months. With regard to the reasons for the delays the appellant stated that it had decided not to apply for the review of the commissioner's decisions before the respondent served its Statement of Case because it "*may very well have been that the third respondent could have abandoned its claim of unfair labour practice and thus it would not have become necessary for the [appellant] to expend time and money on instituting a review application if the third respondent was not going to process the matter*". After it received the

respondent's Statement of Case it realised that it had to proceed with the review application. The appellant added that the first thing it did was to prepare its response to the respondent's Statement of Case which was then served upon the respondent. The response was served after the expiry of the time period within which the appellant had to do so. The delay, it said was caused because its attorneys *"were at some stage out of town"*. After it filed its response to the respondent's Statement of Case, it consulted with its attorneys to launch the review application.

[14] In so far as prospects of success were concerned, the appellant referred to its review application and finally it submitted that the respondent would not suffer any prejudice if the condonation was granted whereas the prejudice to the appellant would be severe in that it *"would not have a fair opportunity to address the Honourable Court on the misconduct committed by the commissioner"* and it would be a *"miscarriage of justice"* if the commissioner's ruling and certificate were allowed to stand.

[15] In opposing the condonation application the respondent stated, *inter alia,* that, immediately, after it was served with the review application it informed the appellant that it (appellant) was obliged to apply for condonation. The appellant nonetheless took 39 days after its attention was drawn to that fact to apply for condonation.

[16] The application to condone the late filing of the review application as well as the review application served before the Labour Court in December 2006. The Labour Court found that the appellant had failed to provide a reasonable explanation for the delay and that it had no basis upon which to set aside the ruling made by the commissioner or to set aside the certificate issued by him and thus dismissed the application.

[17] The appellant now comes to this Court on appeal against the judgement of the Labour Court with the leave of that Court. The appellant it appears failed to file the record for this appeal within the period prescribed by the Rules that govern proceedings in this Court consequently this appeal is deemed to have been withdrawn. The appellant also failed to timeously file its power of attorney to prosecute the appeal. The appellant has however, brought an application to reinstate the appeal and condone the late filing of its power of attorney.

[18] Having considered the reasons proffered for the delay in filing the record and the power of attorney, this Court sees no reason to refuse the application. This application is also not opposed by the respondents.

[19] With regard to the merits of the appeal, the first issue is that of condonation for the late filing of the review application. The factors that the court needs to take into account in determining an application

for condonation are well known and include: the degree of delay; the explanation therefore; the prospects of success; and, the prejudice which might be caused to either party.[1] While the review application was launched, according to the appellants, two and a half months late the application to condone the lateness of the review application was only bought a month later. The review application was effectively three and a half months late. A delay of two and a half or three and a half months is in any event substantial if account is taken of the fact that the Act prescribes that an application to review a decision of a CCMA commissioner must be made within 6 weeks.

[20] The explanation proffered by the appellant for the delay, which was for the period until the review application was filed, is vague inadequate and unsatisfactory. Firstly it states that the attorney who was attending to the matter on its behalf was *"at some stage out of town"* this was supplemented in its replying affidavit to add that the attorney *"was in Phokeng at the relevant time, conducting an investigation on another matter that he was briefed on"*. The appellant fails to state why it could not obtain the services of another attorney who might have considered the appellant as a sufficiently important client to deal with its matter or why another attorney in the same firm could not attend to the matter. Secondly, there is simply no explanation as to why the attorneys when consulting on the drafting of its response to the respondent's Statement of Case did not also consult about the review application. To take two weeks to consult and draft a

[1] See Melane v Santam Insurance Co. Ltd 1962 (4) SA 531(A)

response to a Statement of Case and thereafter to take a further two weeks to consult and draft a review application which review application contains substantively no new information other than what was contained in the appellant's response to the respondent's Statement of Case is an explanation that cannot, on a balance, be believed. Thirdly, to suggest that it did not proceed with the review application because of some belief that the respondent may not pursue its claim is devoid of reason. There is no explanation as to why the appellant would come to such a belief particularly since both the parties had agreed on the further conduct of the matter at the CCMA (that of referring the dispute to the Labour Court) and there is nothing whatsoever to indicate that they may have been a change of heart in pursuing the claim.

[21] Furthermore in the matter of *Allround Tooling (Pty) Ltd v Numsa*[2] it was held that an application for condonation must be brought at the earliest opportunity once the need to seek condonation arises. This was not done. The appellant fails to provide any explanation as to why, after having served the review application on the respondent and being advised, by the respondent, two days later that it is required to apply for condonation for the late launching of the review application, it took a further 39 days to launch its condonation application.

[22] As regards the merits of the review application; the appellant contended that the commissioner committed misconduct in arriving at

[2] [1998] 8 bllr 847 (LAC) para 8. Also NEHAWU v Nyembezi [1991] 5 BLLR 463 (LAC) para 5.

the ruling it did with regard to the issue that the CCMA had no jurisdiction to entertain the dispute in the absence of a condonation application. In this respect arguments were presented by the parties on the basis of the referral document and the correspondence that passed between the respondent's attorneys and the CCMA. No evidence was led. In the absence of any evidence, for appellant to argue that the commissioner *"failed to consider the evidence placed before him"* and *"failed to consider the [appellant's] undisputed evidence"* reflects either a lack of appreciation by the appellant of what constitutes evidence or a failure to appreciate what transpired before the commissioner.

[23] The referral document stated that the dispute was *ongoing* and that the dispute had its genesis in 1998 when the appellant promoted or upgraded three artisans from a salary scale of 403 to 300. Furthermore, the correspondence from the respondent's attorneys explained that the respondent was only proceeding with a claim that fell within a time frame over which the CCMA had jurisdiction.

[24] At the CCMA the appellant argued that the respondent's submission that the dispute is ongoing is without merit because the unfair labour practice / unfair discrimination complained of took place in 1998 with the promotion/ upgrading of certain employees. What was ongoing (it argued) was the consequence of the promotion/upgrade: that is the continued differential in the salary which the promoted/ upgraded employees received as opposed to the salary received by the grievants.

The unfair labour practice/ unfair discrimination act therefore occurred more than 90 days before the referral was made the CCMA and, as such, the CCMA could not and should not have entertained the referral without the respondent having been granted condonation for doing so outside the prescribed time limit.

[25] S191 (5) of the Act provides that a dispute about an unfair labour practice must be referred to a council having jurisdiction to resolve the dispute or to the CCMA within:

> *"90 days of the date of the act or omission which allegedly institutes the unfair labour practice or, if it is a later date, within 90 days of the date on which the employee became aware of the act or occurrence."*

[26] The ruling of the commissioner that the respondent's referral was made timeously appears to be based on its belief that since the alleged unfair labour practice only came to the knowledge of the Union who referred the matter to the CCMA, within the 90 day period prescribed by the Act the referral was not made out of time. This is clearly erroneous. It is not the knowledge of the Union that is relevant but that of the *"employee"*. Section 191(5) clearly provides that the referral must be made, if not within 90 days of the act or omission constituting the unfair labour practice, than *"within 90 days of the date on which the employee **(my emphasis)** became aware of the act occurrence."*

[27] The ruling of the Commissioner would therefore be open to be reviewed and set aside if the dispute constituting the unfair labour practice was said to occur in 1998 as alleged by the appellant. The problem however is that the argument presented by the appellant is premised upon the belief that the unfair labour practice/unfair discrimination consisted of a single act. There is however no basis to justify such belief. While an unfair labour practice/unfair discrimination may consist of a single act it may also be continuous, continuing or repetitive. For example where an employer selects an employee on the basis of race to be awarded a once off bonus this could possibly constitute a single act of unfair labour practice or unfair discrimination because like a dismissal the unfair labour practice commences and ends at a given time. But, where an employer decides to pay its employees who are similarly qualified with similar experience performing similar duties different wages based on race or any other arbitrary grounds then notwithstanding the fact that the employer implemented the differential on a particular date, the discrimination is continual and repetitive. The discrimination in the latter case has no end and is therefore ongoing and will only terminate when the employer stops implementing the different wages. Each time the employer pays one of its employees more than the other he is evincing continued discrimination.

[28] Hence in the present matter the date of dispute does not have to coincide with the date upon which the unfair labour practice/ unfair discrimination commenced because it is not a single act of

discrimination but one which is repeated monthly. In the circumstances the dispute being labelled as ongoing was an accurate description of the *"dispute date"* and the decision arrived at by the commissioner that there was no need for the respondent to seek condonation was correct.

[29] Finally, on the issue of the Certificate: there was no basis for the Labour Court to interfere with the certificate issued by the commissioner. The certificate was issued with the consent of the appellant in that not only did it agree to its contents, its representative also appended his signature upon the certificate to indicate a proper recordal of the contents of the agreement that it concluded with the respondent.

[30] In the circumstances as the explanation for the delay was unsatisfactory and the merits for the review of the commissioner's decision, non-existent there is no basis upon which the Labour Court could have interfered with the ruling handed down by the commissioner.

[31] The appeal must therefore fail. With regard to cost I see no reason why, having regard to law and equity, costs should not follow the result.

[32] In the result I make the following order:

(a) the appeal is reinstated.

(b) the appeal is dismissed with costs. The decision of the Labour Court dismissing the application for condonation and review is confirmed.

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WAGLAY ADJP

I agree

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PATEL JA

I agree

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SANGONI AJA

Appearances

For the appellant : Adv Mokhare
Instructed by : Maserumule Inc
For the respondent : Adv JG Van der Riet SC
Instructed by : Cheadle Thompson & Haysom

Date of hearing : 10 November 2009

Date of judgment : 18 November 2009