**REPUBLIC OF SOUTH AFRICA**

**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

**JUDGMENT**

**Reportable**

Case no: JR 973/10

In the matter between:

**PLESSY INTERNATIONAL LTD** Applicant

and

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

**ALD PIETERS NO** Second Respondent

**BERNARD TERBLANCHE** Third Respondent

**Date heard: 1/11/2013**

**Date delivered: 12/2/2014**

**Summary: Application to review a condonation ruling on the ground of a 'gross irregularity'.**

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**JUDGMENT**

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Rabkin-Naicker J

[1] This is an opposed review of a condonation ruling by the second respondent (the Commissioner) in which the following was recorded as the decision:

"[6] Having considered all of the above, the weight of the arguments are in favour of granting condonation. It is noted that the period of lateness, although significant, is not alarmingly late. In my view, the applicant's explanation for the lateness under point 2 is reasonable in view of the applicants self-confessed lay understanding of labour matters. The respondent argued extensively on the applicant's prospect of success and that the applicant was not retrenched as his fixed contract came to an end. Significantly it argued that the CCMA lacks jurisdiction over the matter geographically, thus further reducing the applicants prospects of success. All these points are disputed by the applicant and it is my decision that fact finding at arbitration will deal with the merits of each parties arguments. See – EOH ABANTU (PTY) LTD VS CCMA AND 2 OTHERS – CASE NO JR2911/07 (17 para 30).

[7] Condonation is granted."

[2] In the **EOH Abantu**[1] matter referred Cele J stated as follows:

"[28] The question whether or not an employment relationship existed is one which, like the question whether or not an employee was in fact dismissed, falls within the jurisdiction of the commission to determine in the course of its [arbitration] functions. The significance of this distinction is most evident when the role of a reviewing court is considered. The commission has power to determine the question whether or not a party to a dispute referred to it is an employee or an independent contractor. This means that the question does not raise a jurisdictional issue in the sense contemplated in rule 14 of the rules, and that a conciliation commissioner is under no duty to determine the question at the conciliation stage of the proceedings.

[29] Where the jurisdictional issue in question requires the resolution of a factual dispute, the leading of oral evidence and a determination of difficult questions of mixed law and fact, on matters that are intimately

[1] 2010(31) ILJ 37(LC)

bound up with the substantive merits of the dispute may legitimately be deferred to the arbitration stage of the proceedings.

[30] The conciliation function of the commission is materially different from the arbitration function. The commission, in conducting arbitration proceedings, has been described by the Constitutional Court as an administrative body exercising a quasi-judicial function. A commissioner conducting an arbitration process is therefore performing an administrative function. A commissioner's performance of the conciliation function is not reviewable on the principle of legality. In this regard, it is respectfully submitted that the decision of the honourable court in Seeff Residential Properties is clearly wrong. "

Evaluation

[3] The **EOH Abantu** case referred to above, was not in point with the matter before the Commissioner. The Commissoner heard a condonation application prior to conciliation of the dispute, in which the issue of jurisdiction formed part of the 'prospects of success' leg of the enquiry he was bound to make. The Commissioner was therefore incorrect when he relied on the **EOH Abantu** authority. He failed to grasp an important distinction between the two enquiries: A ruling on a jurisdictional point which is made by a commissioner on the basis of facts and law is decided on a balance of probabilities. In a condonation application, the question of prospects of success (including *in casu* whether the respondent was an employee and/or his employment was governed by the laws of the RSA) falls to be determined on facts *prima facie* established i.e. on facts which if proved, would entitle a party to the relief sought in the main application.

[4] This misconception by the Commissioner, as the applicant averred, amounts to a gross irregularity i.e. the Commissioner misconceived his mandate[2], or to put it differently, the nature of the enquiry before him. In **Goldfield Mining South Africa (Pty) Limited (Kloof Gold Mine) v CCMA and Others**, the

[2] Telecordia Technologies Inc v Telkom SA Ltd 2007 (3) SA 266 (SCA) paragraphs 72and 73

Labour Appeal Court per Waglay JP[3] has held that a reviewing court, having found that an arbitrator has committed a gross irregularity, must still apply the test set out in Sidumo – i.e. was the decision by the arbitrator one that another decision-maker could reasonably have arrived at based on the evidence before him. In **Goldfields**, the court found that the arbitrator incorrectly categorized the case before him as poor performance when in fact it was a case of misconduct and stated as follows:

> "It therefore follows that in approaching the dismissal as one effected for poor performance, the arbitrator committed a gross irregularity in the conduct of the proceedings. The conclusion he arrived at was influenced by the wrong categorization of the case against the third respondent. This however is not sufficient for the award to be reviewed and set aside. The question needs to be asked: had the categorization of the case against the third respondent been misconduct as opposed to poor work performance, is the arbitrator's award nonetheless one that could be arrived at by a reasonable decision-maker?"[4]

[5] It is not necessary for me to follow **Goldfields** in this matter, and enquire into whether the decision to grant condonation is nonetheless one that could be arrived at by a reasonable decision-maker. **Goldfields** dealt with the review of an arbitration award, and considered the requirements for review in the context of arbitration proceedings under section 145 of the LRA. The relevant provision we are dealing with is that contained in section 158(1)(g) of the LRA which provides that the Labour Court may:

"(g) subject to section 145[5], review the performance or purported performance of any function provided for in this Act <u>on any grounds that are permissible in law</u>;" (my emphasis)

[6] In **Carephone**[6] the Labour Appeal Court held that on a correct interpretation of sections 145 and section 158(1)(g), Section 158(1)(g) does not confer a

[3] Case Number JA 2/2012 delivered on 4 November 2013
[4] At paragraph 20
[5] The phrase "subject to section 145" replaced that of "despite section 145" in the 2002 amendments to the LRA

general power of review but provides merely for review of administrative functions not defined specifically in ss 145 and 158(1)(h) of the LRA. This led to the amendment of section 145, the history of which was dealt with by Ngobo J (as he then was) in his minority judgment in **Sidumo:**

> "[187] I pause here to refer to the history of s 158(1)(g). This provision originally used the words 'despite s 145' instead of 'subject to s 145'. Prior to the decision of the Labour Appeal Court in Carephone, there were conflicting decisions of the Labour Court on the question whether the Labour Court has the power to review arbitral awards under s 158(1)(g). The one line of decisions held that there was no such power. However, a majority of the decisions of the Labour Court held that there was such power. As the Labour Appeal Court pointed out in Carephone, apart from the language of the provision, the reasoning in favour of the application of s 158(1)(g) found justification in the view that the grounds of review under s 145 were limited in scope and did not give expression to the right to just administrative action in s 33 of the Constitution. In Carephone the Labour Appeal Court construed the word 'despite' in s 158(1)(g) to mean 'subject to', this being 'a lesser evil than ignoring the whole of s 145' and held that the review of CCMA arbitration awards must proceed under s 145 of the LRA. The legislature subsequently intervened and introduced an amendment in line with the decision in Carephone."

[7] The 'gross irregularity' ground, latent or patent, is a standalone ground for the review of administrative decisions which are permissible in our law.[7] I am therefore not bound to follow the approach in **Goldfields** when reviewing a condonation ruling under section 158(1)(g). I note that this judgment highlights what might be considered as an anomaly: i.e. that 'gross irregularity' is a standalone ground of review of one administrative function under the LRA (a condonation ruling), but is not, after **Goldfields**, of another administrative function (an arbitration award). Whether this is indeed an anomaly is not for this court to decide.

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[6] Carephone (Pty) Ltd v Marcus NO & Others 1999 (3) SA 304 (LAC) at paragraph 26
[7] See section 6(2) of PAJA

[8] The ruling *in casu* stands to be reviewed and set aside. I do not consider it appropriate to substitute the ruling given the limited record of the condonation proceedings. Nor do I find this to be a matter in which costs should follow the result. I therefore make the following order:

1. The ruling under case number GAJB 3308-10 dated 12 March 2010 is hereby reviewed and set aside;
2. The condonation application is referred back to First Respondent for re-hearing before a Commissioner other than the Second Respondent

Rabkin-Naicker J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate MA Lennox instructed by Mohons Attorneys

For the Respondent: Advocate JSC Nkosi instructed by Graham Attorneys