9033800**IN THE LABOUR COURT OF SOUTH AFRICA**

(Held in Cape Town)

9033800Case No

C463/04

In the matter between: **REPORTABLE**

GIWUSA obo PG HEYNEKE Applicant

And

KLEIN KAROO KOOPERASIE BEPERK 1st Respondent

JUDGMENT

STELZNER AJ

1. This is an application for condonation for the late filing of the Applicant's statement of claim, which application is opposed.

2. The matter was originally referred to the CCMA for conciliation after the Applicant was dismissed with effect from 30 August 2003. The CCMA conducted a brief conciliation by telephone. It was quickly apparent that the matter was not capable of settlement and a certificate of outcome was issued on 22 October 2003. The certificate did not indicate to which forum the matter should be referred. The statutory form allows the CCMA commissioner to tick a box indicating that the matter is to be referred to the Labour Court or to arbitration. These boxes were left unmarked.

3. On 1 November 2003 the Applicant referred the matter to the CCMA for arbitration. The arbitration was postponed on two occasions and eventually came before a commissioner on 17 August 2004. On that date for the first time, the Respondent raised by way of a preliminary point that the CCMA did not have jurisdiction to hear the matter because it concerned a retrenchment (a dismissal for operational requirements).

4. On 17 August 2004 the commissioner indicated her ruling verbally to the effect that the CCMA did not have jurisdiction to arbitrate as more than one employee had been retrenched at the same time as the Applicant. A written ruling to that effect was issued on 1 October 2004.

5. The Applicant filed a statement of claim with this Court on 10 December 2004. The statement of claim was not accompanied by an application for condonation. The Respondent filed its opposing papers on or about 30 December 2004. In those papers the Respondent took the point that the referral had not been made within 90 days after the certificate of outcome was issued as prescribed by section 191(11) the Labour Relations Act, of 1995 ("the Act").

6. An application for condonation in respect of the late filing of the referral was made by the Applicant on 17 March 2005 and was opposed by the Respondent in papers filed on 1 April 2005. It is this application for condonation which is before me.

7. The main line of argument for the Applicant which was set out in the papers and which was pursued by Mr Vosloo who argued the matter before me was that in fact no application for condonation was required. The argument went like this. The Act requires of the CCMA to attempt to conciliate a dispute. The telephonic 'conciliation' conducted by the

CCMA was not conciliation in the proper sense and as required by the Act. Therefore, the first event that could properly be regarded as a conciliation was the arbitration of 17 August 2004 which proceeding should thus be regarded as having been a con-arb. If the proceedings of 17 August 2004 were, properly construed, a con-arb, then the ruling which was issued in writing on 1 October 2004 should be construed as the 'certificate of outcome'. If the ruling of 1 October 2004 was the certificate of outcome then the referral of 10 December 2004 was not late and no application for condonation was required. In the alternative, however, and almost by way of afterthought, the Applicant argued that good cause had been shown for condonation for the late filing.

8. The Respondent made the point in its papers and in argument that the Applicant was represented by his union from at least 24 November 2003, when a meeting took place between the parties at which the Applicant was represented by GIWUSA. (The Applicant initially referred his dispute to the CCMA on his own and GIWUSA only became an Applicant itself, representing Heyneke, in the referral to this Court.)

9. The Respondent also argued that the fact that conciliation took place telephonically did not detract from the fact that the CCMA had attempted to resolve the dispute. It is frequent practice in the CCMA to conduct telephonic conciliations and this practice does not contravene any provision of the Act. The Act simply requires that the Commissioner appointed by the CCMA must attempt to resolve the dispute through conciliation (section 135(1)). The Act does not prescribe that a meeting between the parties be convened for that purpose. In fact section 135(3) goes on to provide that the Commissioner must determine the process for the purposes of attempting to resolve the dispute. Further

conciliation did not take place as the Applicant had indicated clearly that he did not regard the matter as being capable of settlement.

10. The Respondent pointed out that the proceedings of 17 August 2004 were clearly conducted as arbitration proceedings and not as a con-arb. This much appears from the ruling itself which starts with the words "*The arbitration hearing was held …*". The Respondent raised its point *in limine* regarding jurisdiction. The Applicant raised no point in regard to an alleged failure by the CCMA to properly conciliate the dispute. Indeed, the Applicant referred the dispute to arbitration on the strength of the certificate of outcome issued on 22 October 2003. If he had been dissatisfied with the attempt at conciliation and had thus disputed the validity of the certificate of outcome his remedy would have been to take the CCMA on review in relation to its issuing of the certificate of outcome, with a view to having that certificate set aside. This he did not do.

11. I accordingly find that there is no merit in the Applicant's argument that his referral was not late and that condonation was therefore not required.

12. Since the referral was late and condonation is required I turn to consider whether or not the Applicant has made out a case showing good cause. The law in this regard is well settled and laid out clearly in the case of *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-F.

> "*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 are 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. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits."*

13. The respondent also referred me to a number of decisions in which it was held that where there is an absence of a reasonable and acceptable explanation for the delay prospects of success need not be examined and condonation should not be granted on that basis alone. Further, if a party realises that he has not complied with a statutory time period or rule of court he must apply for condonation without delay. See *Arnott v Kunene Solutions & Services (Pty) Ltd* [2002] 8 BLLR 722 (LC) at 727 paras 34 and 36 and *NUMSA & others v Duro Pressing (Pty) Ltd* [2002] 11 BLLR 1087 (LC) at 1088 para 6 to 1089 para 7, and the cases quoted in those decisions.

14. In this matter the Applicant referred his dispute to this Court some 14 months after the certificate of outcome was issued i.e. some 11 months late. This is a lengthy delay in the context of a 90 time period within which to make such a referral. Furthermore, the Applicant was already aware on 17 August 2004 that he had referred his dispute to the wrong forum, yet he still took until 10 December 2004 to make the correct referral to this Court.

15. The Applicant also did not immediately apply for condonation for his late referral. Instead he took another 78 days before he filed an

application for condonation, on 17 March 2005.

16. His explanation for the delay is bedevilled by the (ill-advised) stance he takes (or his representative takes on his behalf) to the effect that his referral is in fact not late. I have already dealt with and disposed of the arguments in that regard. Had the Applicant on hearing the outcome / ruling of the commissioner on 17 August 2004 immediately taken steps to refer his dispute to this Court together with an application for condonation, it is likely that this Court would have viewed his application with sympathy. The reason for the lateness would clearly have been that the Applicant had erroneously referred his dispute to the wrong forum but had expeditiously, on discovering his mistake, rectified the problem with a referral to the correct forum. However, he chose not to follow this path. In the result I am faced with an incomplete and unsatisfactory explanation for a very late referral. There is simply no explanation before me as to why the Applicant took until 10 December 2004 to file his statement of claim and no explanation as to why it then took him a further 78 days to file his application for condonation (other than the one in which he relies on the point that in fact no application was necessary). The point about the late referral had already been taken by the Respondent in the opposing papers filed late in December 2004. At the very least it was clear to the Applicant then that the point would have to be argued yet he chose to take until 17 March 2005 to file such an application.

17. It appears that the Applicant has been poorly advised and that this has contributed to the predicament he now finds himself in. It is trite law that there are limits to the extent to which a litigant can hide behind delays caused by his representative or lay blame at the door of his representative. (See for example *Kunene Solutions* (supra) at 727 paras

31-3 and *Duro Pressing* (supra) at 1089 para 8). In this case the representative chose, somewhat stubbornly in my view, to pursue a line which was patently incorrect. The artificial attempt to construe the arbitration of 17 August 2004 as a con-arb was clearly conjured up to create an argument to the effect that condonation was not required and a belated attempt was then made, in line with this argument, to discredit the telephonic attempt at conciliation. Had the Applicant genuinely felt that no proper conciliation had been attempted and that his rights had been prejudiced in this regard one would have expected him at that stage already to take the certificate of outcome on review. Although the representative is a union official and not an attorney, the contrary arguments were drawn to his attention by the Respondent and he still chose not to deal with the issues until the belated filing of an application in March 2005 which application still failed to provide a full and proper explanation for the full period of the delay and in which the Applicant persisted with the ill-advised stance described above.

18. In the circumstances it is not necessary for me to consider the prospects of success as the application must fail on this ground alone.

19. The application for condonation for the late referral of applicant's dispute is refused with costs.

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Stelzner AJ

Date of hearing	26 April 2005
Appearance for Applicant	Mr JN Vosloo of GIWUSA
Appearance for 3rd Respondent	Adv R Eksteen instructed by Viljoen - Wasserman attorneys
Date of judgment	6 May 2005