

SOUTH AFRICA / JUDGMENT

Khan v Local Trans and Another (C690/2009) [2010] ZALC 327 (20 April 2010)

[2010] ZALC 327

COURT

Labour Court

BEFORE

Cheadle

CASE / FILE NUMBER

C690/2009

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

C690/2009

JUDGMENT

1

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: C690/2009

DATE: 20 APRIL 2010

In the matter between:

T A KHANApplicant

and

LOCAL TRANS1st Respondent

COMMISSIONER2nd Respondent

J U D G M E N T

CHEADLE, AJ:

This is an unopposed application to review and set aside a ruling of the second respondent, a Commissioner at the CCMA refusing

condonation for the late referral of a dismissal dispute to the CCMA. The principal reason for the refusal of condonation appears from the Commissioner's notes, namely that there was no prospect of success. The Commissioner concluded this on the basis that the applicant had entered into a service agreement with the third respondent in February 2009 and was accordingly not an employee when he was dismissed in April 2009.

It is clear from the founding affidavit that he entered into the service agreement because, if he did not do so, he would no longer be employed and he could not afford to be without an income. In his testimony, the applicant confirmed what is said in that affidavit.

Although he describes himself as an independent subcontractor in those three months, it is evident from testimony that he gave before me, that what transpired was an offer to accept the so-called service agreement or lose his job. Although the service agreement was described as an owner-driver arrangement, the vehicle belonged to the employer. The employees continued to do exactly what they had done before 31 January 2009. In terms of the service agreement, he was paid R700 per day from which the sum of R500 for rental of the owner's vehicle was deducted, amounting to effective take home pay of R200 per day.

This meant that the applicant earned R4 000 less a month than he did under his employment contract. Under that contract he received R7 500 a month whereas he only took home R3 500 under the service contract. The applicant also testified the 3rd respondent told him that he did not want to have the responsibility of reporting to the bargaining council and paying various amounts of money to it and that he wanted owner drivers instead. As the applicant stated, the object of this service agreement was to avoid

his labour law responsibilities.

It follows that the second respondent failed to properly apply his mind to whether or not the applicant had in fact terminated his employment on 31 January 2009 and whether that termination and the new service contract, was a ruse to reduce the applicant's

salary and to avoid the obligations of the bargaining council and the employment laws. Having failed to take this into account, it follows that the commissioner committed an irregularity and accordingly should have granted the condonation ruling based on the applicant's prospects of success.

Moreover if in fact the service contract was simply an attempt to avoid the obligations of the employment laws, the employee would

still be an employee for all intents and purposes when he was dismissed on 29 April, which of course would also mean that the period of delay would be substantially reduced.

For these reasons, the matter is referred back to the CCMA for it to appoint another commissioner to hear the matter. So I make the following order:

1. The condonation ruling award dated 26 August 2009 under CCMA case number WECT 11412/09 is reviewed and set aside.
2. The first respondent is required to remit the dispute to another commissioner for determination.
3. There shall be no order as to costs, the matter being unopposed.

CHEADLE, AJ

/bw /...

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALC/2010/327.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/khan-v-local-trans-and-others-unknown-topic-alc-2010>

Prepared on 10 October 2026 · Esheria