IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: JA 09/07

HAROLD ARTHUR THOMPSON Appellant

and

NATIONAL HEALTH LABORATORY SERVICES Respondent

J U D G M E N T

KHAMPEPE, ADJP:

Introduction

[1] This is an application for condonation for the late filing of the record in terms or rule 5 (8) of the Labour Appeal Court Rules. The application for condonation is moved in terms of rule 9 of the Labour Appeal court rules. The

appellant referred a dispute of unfair dismissal to the Labour Court in terms of sections 189 and 191(5)(b)(ii) of the Labour Relations Act ("*the Act*").

[2] The background to this application is that the Respondent *in limine* raised the defence that the appellant had not been an employee as defined in the Act. The point *in limine* was upheld by the court *a quo* resulting in the dismissal of the appellant's application with costs.

[3] On the 7th April 2006, the court *a quo* granted the appellant leave to appeal to the Labour Appeal Court with costs of the application to be costs in the appeal.

[4] On the 4th of May 2006, the appellant filed his notice of appeal. The record of appeal was not filed timeously; it was filed approximately 10 months later. On the 11 April 2007 a purported application for condonation together with four copies of the record were filed on behalf of the appellant.

[5] There was no Notice of motion which accompanied that application. The application was in fact a founding affirmation by the attorneys of the appellant with a heading "Application for Condonation".

[6] The affirmation consists of only six pages. Three pages thereof deal with correspondences exchanged between the appellant's attorneys and Sneller transcribers from the 26th April 2006 to 28th March 2007 in regard to obtaining the

transcript of the record. The respondent alludes to the correspondences in the context of explicating the reasons for the delay in filing the transcript of the record.

In paragraph 2.3 and 8 of the founding affirmations it is stated that:

> "*2.3* *The appellant has not willfully delayed the proceedings in this matter. As the legal representative of the appellant we have at all times vigorously pursued the transcription of the record of the proceedings a quo…..*"
>
> "*8.* *While we have failed to apply for an extension of the time allowed to file the record, the Appellant has been attempting to obtain a time frame from Snellers in which to obtain the record, and we believe that it would burden the court to approach the Judge President without being able to give a guarantee of when the record would be available.*"

[7] In terms of rule 5(8) the appellant was required to deliver the record within 60 days of the order granting leave to appeal.

[8] The affirmation alludes, in broad strokes to normal correspondences between the appellant's legal representative and Sneller. It is however silent on why Rule 5(17) was not complied with. The rule provides that:

> "*If the appellant fails to lodge the record within the prescribed period, the appellant will be deemed to have withdrawn the appeal, unless the appellant has within that period applied to the respondent or the respondent's representatives for consent to an extension of time and consent has been given. If consent is refused the appellant may, after delivery to the respondent of the notice of motion supported by the affidavit, apply to the Judge President in chambers for an extension of time. The application must be accompanied by proof of service on all other parties. Any party wishing*

to oppose the grant of an extension of time may deliver an answering affidavit within 10 days of service on such party of a copy of the application."

[9] There was no feeble attempt by the appellant to give any explanation why the rule was not adhered to. It is trite that the object of the rule is to secure an inexpensive and expeditious completion of litigation before the court. The consent of the respondent's attorneys to the extension of time and an application to the Judge President in this regard was not made.

[10] The application for condonation is vehemently opposed by the respondent on the basis that it is defective both in form and in substance and should be dismissed with punitive costs.

[11] Notably, it was argued on behalf of the respondent that the purported application fell foul of form 4 to the rules for the conduct of proceedings in the Labour Court in that no notice of motion was attached to the affirmation. There was therefore no prayer for the relief sought.

[12] The appellant has in his reply candidly admitted that he failed to attach the notice and also appreciated the defect in the purported application. He however sought to suggest that the notice of motion was already prepared but was inadvertently omitted when the affirmation was served on 11 April 2007. It is worth noting that the founding affirmation was served on 11 April 2007.The notice of motion served in terms of the replying affirmation is however not dated 11 April

but 17 May 2007. This discrepancy ineluctably impels an inescapable conclusion that the notice of motion had not been prepared by or before 11 April 2007 and that the appellant has clearly not played open cards with the court in this regard. This sort of disingenuity on the part of the appellant is to be deprecated.

[13] It is plain that the appellant seeks to cure a defective application by merely attaching the notice of motion to its reply. This, in my view, is impermissible as the case law clearly demonstrate. *Poseidon v African Coaling and Exporting Co (Durban) (Pty) Ltd and Another* 1980 (1) SA 313 (A) is authority for the proposition that a hopelessly defective application cannot be cured in reply. It was in my view, essential for the appellant to set out in his notice of motion the relief he was seeking. His failure to do so rendered his application defective.

[14] Assuming that the appellant had brought a proper application for condonation, the basic approach is that I have to exercise a discretion to grant condonation based upon a consideration of a compendium of factors which include**:** The degree of non-compliance, the explanation therefor, the importance of the case and the prospects of success. What is needed is an objective conspectus of all the facts. A slight delay and a good explanation may help to compensate for prospects of success which are not strong. The importance of the issue and strong prospects of success may tend to compensate for a long delay. However, where there is no reasonable and satisfactory explanation for the delay, the prospects of success are immaterial. *See NUM v Council for*

Mineral Technology (1999) 3 BLLR 209 (LAC); Melane v Santam Insurance Co Ltd 1962 (4) SA 531 (A); Radebe and Others v Protea Furnishers SA (Pty) Ltd 1994 ILJ 15 323 (LAC); Oldfield v Roth NO And Another (1995) 16 ILJ 76 (LAC)

[15] The appellant has submitted that his non-compliance with Rule 5(8) was occasioned by the dilatory conduct of the subscribers "*Snellers*" who did not attend to the timeous transcription of the record. The respondent however submitted that the appellant has shown wanton disregard of the rules because he has not advanced any plausible explanation for his non-compliance with Rule 5 (17).

[16] In argument, it was submitted on behalf of the appellant that he has at no time willfully delayed the filing of the appeal record. It was argued that the transcription company attending to transcribing the record of the proceedings namely Snellers Verbatim (Pty) Ltd ("*Snellers*") was experiencing great difficulty at the time in transcribing records timeously, due to it suffering staff shortages, technical faults with its server and being occupied with a new handover to its new company Lom Business Solutions (Pty) Ltd.

[17] It was further submitted that Sneller had deposed to an affidavit which assumed full accountability for the fact that the final corrected transcription was only delivered at the end of March 2007. It was therefore contended that the appellant was unable to apply for an extension of time in terms of rule 5 (17)

because he was wholly unaware of when the transcription would be available and thus the appellant was not in a position to give the court guarantee as to when the record would be available. This argument suggest that the appellant was unable to seek an extension in terms of rule 5(17) because of want of information of when the transcribers would complete preparing the record.

[18] This argument is plainly implausible and misconceived and underscores the wanton disregard displayed by the appellant for the rules of the court. It cannot be further emphasized that in terms of Rule 5(17) the appeal is deemed to have lapsed on the mere failure to lodge the record within the 60 day period. The rule, as has been observed in many cases, is intended to provide an expeditious, inexpensive and a simple manner to avoid the lapse of the appeal. If there are glitches in the preparation of the record, as this case evinces, no explanation has been advanced why the consent of the respondent was not sought. Knowledge of when and information relating to the date, the record would be available was not a prerequisite for the requisite consent. There is furthermore no explanation why the Judge President was not approached in chambers for an order to this effect. The lack of urgency with which the application for condonation was conducted which is shown by the fact that the appellant did not take any steps in terms of rule 5 (17) or launch any application in terms of the Rules within a reasonable time, is in itself disturbing. The explanation advanced is, when all the facts are considered, simply not compelling.

[19] In any event where non observance has been flagrant and gross, as in this case and no reasonable and acceptable explanation for the delay has been advanced, an application for condonation should be refused whatever the prospects of success might be. (See *NUM v Council for Mineral Technology* (supra) at pg 211 para 10, Chetty v Law Society, Transvaal 1985 (2) SA 756 (A) at 765 A-C; National Union of Mineworkers & Others v Western Holdings Gold Mine (1994) 15 ILJ 610 (LAC) at 613 E.) Having regard to the above, there is in my view no reasonable and cogent explanation for failing to seek an extension of time in terms of Rule 5 (17).

[20] Counsel for the appellant has however, submitted that this Court must condone the non observance of the rules simply because the breaches were due to the neglect of the appellant's attorneys. It has not been argued that the appellant was an illiterate person completely uninformed about the rules relating to the conduct of proceedings in matters of this sort. A fleeting reading of the record in this matter, fortifies my view that he was not. When he gave evidence in the court a quo, he stated that he was aware of the dominant impression test applicable to determine whether an employee was an independent contractor or an employee in terms of the Act.

[21] Having regard to the kind of legal knowledge claimed by the appellant during the proceedings in the Court a quo, it would be inconceivable and incomprehensible why he would not have had any interest in obtaining

information from his attorneys regarding the conduct of his appeal. Counsel for the Respondent, has submitted that the appellant cannot hide behind his attorney's remissness or ineptitude in these circumstances. I agree. Whilst there are cases where the court will show great reluctance to penalize a litigant for the conduct of his attorneys, this is not such a case. The appellant, in my view cannot be held to have been without blame for the delay in approaching the court for condonation and the blame for the delay must not only fall on his attorneys but must be ascribed to him as well. In any event, the remissness and negligence of the appellant's attorneys is so inexcusable to warrant the refusal of an application for condonation notwithstanding the blameworthiness of the appellant. Even if no blame can be ascribed to the appellant but to his attorney, it is accepted that in deserving cases such as this one:

> "There *is a limit beyond which a litigant cannot escape the results of his Attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court" Salojee v and Another NNO v Minister of Community Development 1965 (2) SA 135 (A) AT 14 C*

Prospects of Success

[22] Notwithstanding the above, Counsel for the respondent has submitted, quite correctly so, that a strikingly absent aspect in the appellant's application for condonation is that relating to the prospects of success on appeal. It is a well established principle that in applications of this sort, the appellant must set forth

briefly and succinctly such essential information as will enable the court to properly asses the appellant's prospects of success. (*Darries v Sherrif, Magistrate Court, Wynberg And Another* 1998 (3) SA 34 @ 41 and *NUM v Council for Mineral Technology* (supra).

[23] In his founding affidavit, the appellant only asserts without substantiating that there are prospects of success. In paragraph 4 of his founding affidavit he stated that:

> "*In granting leave to Appeal the Honourable Acting Justice Tlaletsi states that there is a reasonable possibility that an appellate court may on the facts and evidence supplied have a different conclusion of law about the nature of the relationship between the parties.*"

[24] Despite that the respondent drew the appellant's attention to this fundamental omission, the appellant in his reply adopted the view that "*there was no obligation on myself to set out in detail why the appeal has a reasonable prospect of success*". (Own emphasis)

[25] I accept the submission made on behalf of the respondents that the opinion of the court a quo is not dispositive of the issue relating to the prospects of success. Counsel for the respondent has further submitted that the failure by the appellant to properly address the aspect of prospect of success is a further indication of the remissness, negligence and absolute disregard of the processes

and procedures of this Court. I agree. It is inexplicable to me how the opinion of the court *a quo* with regard to the prospects of success can offer the appellant a license to refrain from briefly and succinctly furnishing such information as to enable this Court to properly asses the prospects of success. The appellant failed to do so and remained intransigent notwithstanding that it was invited to do so by the respondent in its opposing affidavit.

[26] As already alluded to hereinabove, the principle enunciated in many judicial pronouncements is that where the non-observance of the rules has been flagrant and gross, as in this case, an application for condonation should not be granted whatever the prospects of success. (paragraph 14 and 19 supra)

[27] In this case I adopt the view that whatever sympathy the Court might have shown for the appellant must yield to the more important principle that a flagrant disregard for the court rules should not be countenanced. (See *Moraliswani v Mamili* 1989 (4) SA 1 @ 10E-F, *Ferreira v Ntshingila* 1990 (4) SA 271 A @ 281J-282A, *Blemmenthal & Another v Thomson NO* 1994 (2) SA 118 @ 121I-122 B.)

Order

I accordingly make the following order:

The application for condonation is dismissed with costs, such costs to include the respondent's costs on the application for leave to appeal and costs on appeal.

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S KHAMPEPE ADJP

I agree:

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M LEEUW JA

I agree:

_____

K NDLOVU AJA

COUNSEL FOR APPELLANT	ADV. P BUIRSKI
INSTRUCTED BY	CLIFFORD LEVIN ATTORNEYS
COUNSEL FOR RESPONDENT	ADV. BAVA
INSTRUCTED BY	HOFMEYER HERBSTEIN & GIWHALA INC
DATE OF JUDGMENT:	18 SEPTEMBER 2009