IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

REPORTABLE

APPEAL CASE NO: JA94/2009

In the matter between:

NOVO NORSDISK (PTY) LTD	Appellant
and	
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	First Respondent
COMMISSIONER JOYCE TOHLANG	Second Respondent
THULANI MANQELE	Third Respondent

JUDGMENT

JAPPIE JA

[1] On the 26th January 2001 the second respondent, Joyce Tohlang ('the commissioner') acting under the auspices of the first respondent, Commission for Conciliation Mediation and Arbitration ('the CCMA'), issued an award in favour of the third respondent, Thulani Manqele ('the employee'), in which award the commissioner found that the dismissal of the employee by the appellant, Novo Norsdisk (Pty) LTD, to have been substantially unfair and ordered the appellant to reinstate the employee.

[2] The appellant was unhappy with the decision of the commissioner and accordingly brought an application for the review and the setting aside of the commissioner's award.

[3] The application for the review was heard by the Labour Court on the 18th November 2004 when Revelas J reviewed and set aside the commissioner's award.

[4] The employee appealed against the aforesaid decision and on the 6th March 2007 the matter came before the Labour Appeal Court ('the LAC') which struck the matter off the roll. Nevertheless the LAC set aside the decision of Revelas J and issued the following order:-

> (a) The application for review brought by the applicant [the appellant] is struck off the roll to enable the parties in this matter together with the Commissioner who heard the arbitration to re-construct those parts of the record of the arbitration proceedings that are missing in the record and supply whatever documents including exhibits before the Commissioner into the review record.
>
> (b) The applicant [appellant] is directed to immediately take such steps as may be necessary to initiate the process aimed at achieving the purpose envisaged in (a) above, including bring to the attention of the commissioner the fact that the record filed in this review application was incomplete and that her co-operation was required to ensure that there is a complete record before the Court.
>
> (c) The complete record must have been filed or delivered to the registrar within thirty court days from the 6th March 2007, failing which the applicant must in writing to the registrar apply for an extension of time if the complete record is not filed within that period.
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> (d) Once the record has been filed with the registrar or at the time of filing the complete record the applicant [appellant] must in writing request the registrar to give the matter some priority in setting it down for hearing in the Labour Court and it is ordered that the registrar [give this matter] some priority.
>
> (e) The applicant [appellant] is ordered to pay the cost of the third respondent but such costs shall be limited to disbursements.

[5] It is common cause that the appellant failed to comply with the time limit set out in paragraph (c) of the above stated order of the LAC. By the 4th May 2007, the appellant was late by about 15 days when it applied to have the period referred to in paragraph (c) extended.

[6] On the 8th November 2007 the Labour Court granted the appellant an extension of time until the 20th December 2007 to reconstruct and complete the record of the arbitration proceedings.

[7] By the 14th January 2008 the record of the arbitration proceedings still had not been reconstructed and on the 5th February 2008 the Labour Court, per Van Niekerk AJ (as he then was) issued a directive, through the registrar, indicating that the appellant needed to apply for condonation and for a further extension to file the reconstructed record.

[8] In response to the aforesaid directive the appellant brought an application in the Labour Court seeking an order in the following terms:-

1. Condoning the late filing of the Commission for Conciliation, Mediation and Arbitration proceedings reconstructed record in terms of paragraph (c) of item number 2 of the Labour Appeal Courts' Order issued under case number JA10/05 on the 6th of March 2007;

2. Cost of this application in the event of it being opposed.

[9] The employee opposed the application and in response, brought a counter-application in terms of section 158(1)(c) of the Labour Relations Act 66 of 1995 ('the LRA') to make the arbitration award an order of the Labour Court.

[10] Both the application and counter-application were heard by Molahlehi J on the 20th April 2009 and on the 18th September 2009 issued the Labour Court issued the following order:-

(i) The applicant's condonation application for the late filing of the purported reconstructed record of the arbitration proceedings is dismissed

(ii) The arbitration award issued by the second respondent under case number JA76865 and dated 26 January 2001 is made an order of the Court

(iii) There is no order as to costs.

[11] The appellant applied for and was granted leave to appeal by the Labour Court on the 23rd November 2009 to appeal to this Court against the aforesaid order.

[12] The issue in this appeal is whether the Labour Court was correct in dismissing the appellant's application for condonation for the late filing of the reconstructed record of the arbitration proceedings.

[13] Condonation of the non-compliance or non-observance of the rules or directives of a court is by no means a mere formality. In *Foster v Stewart Scott Inc* (1997) 18 ILJ 367 (LAC) at 369 (C-E) the Court stated the following:-

> *"It is well settled that in considering applications for condonation the court has a discretion, to be exercised judicially upon a consideration of all the facts. Relevant considerations may include a degree of non-compliance with the rules, the explanation therefor, the prospects of success on appeal, the importance of a case, the respondent's interest in the finality of the judgment, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice, but the list is not exhaustive. These factors are not individually decisive, but are interrelated and must be weighed one against the other."*

[14] In the application for condonation the appellant explained that its delay in filing the reconstructed record timeously was due to various factors. Firstly, the parties had experienced difficulty in securing a date suitable for them to meet with the commissioner in the attempt to reconstruct the record. Secondly, the appellant contends that the employee frustrated, obstructed and behaved in a manner which hindered the appellant's attempt to have the record of the arbitration proceedings reconstructed. The appellant places the blame largely on the behaviour of the employee and the attitude of the employee's legal representative as being the cause of its failure to timeously reconstruct the record.

[15] Thirdly, the appellant further contends that the registrar of the Labour Court also added to the delay by not informing the appellant timeously of the outcome of its request to extend the period for it to deliver the reconstructed record and thereby contributing to the delay.

[16] In considering whether or not to grant the appellant's application for condonation the Labour Court considered and took into account the appellant's complaints as set out above. The Labour Court concluded that there was no merit in the appellant's complaint that the employee or its legal representative was un-cooperative and frustrated the reconstruction of

the arbitration record. The Labour Court pointed out that at the time the employee's legal representative objected to the date of the first meeting scheduled by the CCMA to reconstruct the arbitration proceedings, the thirty days as set out in paragraph (c) of the order of the LAC had already expired. There is no explanation from the appellant as to why it allowed the thirty days referred to in the LAC's order to have run its course before it made any attempt to schedule a meeting with the commissioner and the employee to reconstruct the arbitration record.

[17] Further, the Labour Court pointed out that from the correspondence between the parties, it would appear that the appellant adopted an attitude that it was in no particular hurry to finalise the reconstruction of the arbitration record.

[18] The Labour Court had a further difficulty with the appellant's application as there was no explanation from the appellant why it had not complied promptly with the directive issued on the 15th February 2008 by Van Niekerk AJ.

[19] Not surprising, given the aforesaid difficulties with the application, the Labour Court came to the conclusion that the appellant had failed to provide an adequate explanation for its failure to timeously reconstruct and deliver the arbitration record.

[20] The Labour Court also considered the merits of the appellant's prospect of success in having the arbitration reward reviewed and set aside.

[21] The employee was charged and dismissed for having committed theft and being in the unauthorised possession of the appellant's property. At the arbitration proceedings, the appellant relied on two witnesses in support of its case that it had dismissed the employee for a substantively fair reason. The appellant had called as witnesses its financial director Mr Berndt and the chairperson of the disciplinary hearing, Ms Sophos. The main thrust of the appellant's case against the employee was that the appellant had received information from a private investigator regarding certain irregularities which were taking place within the appellant's operations. Mr Berndt gave evidence that he had received information from the private investigator that the employee had sold some goods belonging to the appellant at Bruma Lake, Johannesburg. The private investigator had produced and handed over to

Mr Berndt certain photographs. These photographs were produced at the hearing. The appellant, however, did not call the private investigator to testify.

[22] The commissioner regarded most of what Mr Berndt had to say as hearsay and found that on Mr Berndt's evidence the appellant failed to establish that there was a fair reason for the dismissal of the employee.

[23] The Labour Court concluded that the appellant's case against the employee rested entirely on hearsay evidence. The appellant failed to satisfy the Labour Court that the commissioner had erred in not having regard to the hearsay evidence. The Labour Court concluded that section 3(1) of the Law of Evidence Amendment Act 45 of 1988 did not assist the appellant. The appellant had failed to provide an acceptable reason as to why it had not called the private investigator to testify. Without the evidence of the private investigator the appellant could not establish misconduct on the part of the employee.

[24] Before us, the appellant has argued that the Labour Court had erred in deciding the application for condonation according to the ordinary principles relating to condonation as these principles do not apply in a case where an applicant applies for condonation for the late delivery of a record. The Labour Court had committed a misdirection in deciding the appellant's application according to the established principles for condonation. The appellant sought the setting aside of the Labour Court's judgment.

[25] It was further argued that at the arbitration the appellant placed before the commissioner the "best evidence" and that the appellant had good prospects, on the re-constructed record, of having the arbitrator's award reviewed and set aside.

[26] The granting or the refusal of condonation for the non-compliance with the rules or directives of a court is to be decided by applying what is now well established principles and these principles are of general application.

[27] In *Chetty v Law Society*, *Transvaa*l 1985 (2) SA 756(A) the Court in considering when there ought to be a rescission of a judgment stated the following two requirements:-

i that the party seeking relief must present a reasonable and acceptable explanation for his default; and

ii that on the merits such a party has a *bona fide* defence, which, *prima facie*, carries some prospect of success.

[28] It seems to me that the aforesaid requirements are equally applicable when a party seeks condonation. The party seeking condonation must satisfy the court that it has a reasonable explanation for its delay in failing to comply with the time limits applicable to that party. Its failure to put before the court such a reasonable and acceptable explanation entitles a court to refuse condonation. Further, if a court takes the view, that there is little prospects of success then, in my view, a court can justifiably refuse the indulgence being sought.

[29] In the present case it seems to me that the appellant failed to provide an acceptable and adequate explanation for its failure to reconstruct the record of the arbitration proceedings timeously as directed by the Labour Court on several occasions and its reliance on the conduct of the employee and/or its legal representative do not justify the appellant's obvious non-compliance. Moreover, I am unpersuaded that the Labour Court erred in concluding that the appellant's prospects of having the award reviewed and set aside are slim. In my view, the appellant has failed to show that the court *a quo* had erred in dismissing its application for condonation.

[30] No argument was advanced as to why the award of the commissioner should not be made an order of the Labour Court in terms of section 158 (1)(c) of the LRA.

[31] In the result the appeal must fail and the order is issued that the appeal is dismissed with costs.

I agree: Hendricks AJA

I agree: Van Zyl AJA

DATE MATTER HEARD: 7 September 2010

DATE OF JUDGMENT: 6 June 2011

APPEARANCES

Appellant's Counsel: Adv GI Hulley
Instructed by: Tshiqi Zebediela Inc.

Respondent's Counsel: Mr MS Sebola
Instructed by: Retail and Allied Workers Union