

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

CASE NO: JA 56/06

In the matter between:

THE SOUTH AFRICAN POST OFFICE LIMITED

Appellant

and

COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION

First Respondent

COMMISSIONER S MTHETHWA N O

Second Respondent

J B LEKETI

Third Respondent

JUDGMENT

WAGLAY DJP

Introduction

[1] This is an appeal against the judgment of the Labour Court, per Ncamu AJ, in terms of which the court dismissed, with costs, the appellant's application to review and set aside the arbitration award handed down by the Commission for Conciliation, Mediation and Arbitration (the "CCMA"), the first respondent herein. The CCMA had

found the dismissal of the third respondent by the appellant to be both substantively and procedurally unfair and ordered the appellant to “re-employ” the third respondent.

[2] The Labour Court refused the applicant leave to appeal against its decision and the matter comes before this Court by virtue of the appellant successfully petitioning this Court for leave to appeal.

Background

[3] The appellant advertised to fill a position of an “internal investigator”. The incumbent would be required to investigate alleged wrongful conduct by members of the appellant’s staff. One of the minimum requirements outlined in the advertisement was that the candidate must be in possession of a valid code 8 driver’s licence to qualify to fill the position. This, like the other minimum requirements, was crucial for the appointment to the post of an investigator because, if appointed to the position, the incumbent would be required to go into the field in order to conduct the investigations.

[4] Only those who met the minimum requirements as set out in the advertisement were short-listed to fill the position. Hence, if an applicant was not in possession of a valid code 8 driver’s licence, she/he would not be short-listed, interviewed or considered for the position. Evidence was led by the appellant to confirm that an applicant who was only in possession of a learners licence was regarded as not meeting the minimum

requirements for the position and as such disqualified from being considered for the position.

[5] The third respondent applied for the position. In her curriculum vitae (CV), she represented to be in possession of a valid code 8 driver's licence and that she satisfied all the minimum requirements for the position advertised. She was thus short-listed. All of the candidates who were short-listed were then interviewed. The interview process only served to solicit career maturity, assertiveness and capacity to deal with stress, however, in one instance where a certain aspect of a candidate's CV contained ambiguity questions were asked at the interview to clear the ambiguity. The third respondent performed satisfactorily at the interview and was the successful candidate.

[6] On her appointment the third respondent concluded a written contract with the appellant that provided, *inter alia*, the following:

“[I]t is the provision of the employment that the employee has a motor vehicle in a road worthy condition for the purpose of business travel. The vehicle must at all times be available in the exercise of her duties”.

Furthermore the Disciplinary Code, which the third respondent was aware of, provided that the giving of false information was regarded as a serious misconduct which could result in the termination of employment.

[7] Sometime after the third respondent took up her new position, the appellant discovered that at the time that the third respondent: applied for the position, was interviewed; and appointed, she was not in possession of a valid driver's licence as claimed in her CV. This discovery was made after the third respondent was required to go into the field to investigate an alleged misconduct, but could not do so because she did not have a driver's licence and could therefore not be given the company car to drive. The third respondent avers that the appellant only discovered about her deceit when it enquired about her vehicle which she was required to have in terms of her contract of employment.

[8] The appellant viewed the third respondent's conduct as amounting to dishonesty and charged the third respondent with serious misconduct. At the disciplinary hearing, the third respondent conceded that her CV did indicate that she was in possession of a valid driver's licence but that representation was made erroneously. According to the third respondent, she had employed a person to type her CV and had indicated that she was in possession of a learner's drivers licence. The typist mistakenly omitted to include the term "learner's". She had also not checked the CV before she submitted it. She added that it did not concern her that she did not have a valid driver's licence at the time she applied for the position because she had a learner's licence and would have obtained her licence in a short period of time.

[9] The third respondent was nonetheless found guilty of misconduct and dismissed. Believing her dismissal to be unfair, she referred it as a dispute to the CCMA for conciliation. Conciliation failed to resolve the dispute and it was then referred to arbitration.

The Arbitration

[10] The evidence led at the arbitration was that recorded in paragraphs [3] to [9] above and based thereon, the Commissioner decided that the third respondent's dismissal was substantively and procedurally unfair. The Commissioner took the view that because the person appointed to the position of investigator would be called upon to carry out sensitive investigations, she/he should be a trustworthy person with unquestionable integrity. It was the Commissioner's finding that because the third respondent was unaware of the error in her CV she had not compromised her trustworthiness or integrity.

[11] According to the Commissioner the third respondent was guilty of misconduct but her misconduct lay in her failure to "read her resume before submitting it" and this failure he said amounted to "negligence". The Commissioner believed that the "error was genuine" and in the circumstances dismissal as a penalty was "unfair and unreasonable". The Commissioner also accepted the third respondent's averment that the appellant had acted inconsistently in dismissing her on the basis that another employee who also held the position of an investigator was retained in its employ despite being found to be in possession of a fraudulently obtained driver's licence. The Commissioner thus found the

decision on the part of the appellant to dismiss the third respondent, to be unfair and ordered the appellant to “re-employ” the third respondent on a final written warning valid for six months.

[12] Furthermore, although earlier in his award the Commissioner states that “*the hearing itself was in my view substantially procedurally fair*”, he also found the dismissal to be procedurally unfair.

The Labour Court

[13] The appellant took the view that the arbitration award was not justifiable having regard to the evidence presented at the arbitration, and that the conclusions drawn by the Commissioner were not justified in the light of the evidence presented there. It thus applied to the Labour Court to review and set aside the award and remit the matter back to the CCMA to be arbitrated by a commissioner other than the second respondent.

[14] The Labour Court, while acknowledging that that the third respondent supplied false information to the appellant, agreed with the Commissioner that the false information was supplied in “error”. The Labour Court found that the third respondent had not made a fraudulent misrepresentation, but had merely been negligent and that the Commissioner could not be faulted in finding that the error made by the third respondent was “genuine”. The Labour Court also took the view that although the third respondent’s

employment contract with the appellant provided that the giving of false information may lead to dismissal, this was not intended, said the court to “cover genuine errors”.

[15] The Labour Court then went on to say that it could also not interfere with the award because: there was no evidence that the third respondent was appointed because she was in possession of a driver’s licence; that the third respondent, in any event, obtained a driver’s licence *albeit* sometime after she obtained the position; the third respondent had a clean record; and, curiously, that the appellant could have recovered part of the salary that she had earned as an investigator.

The Appeal

[16] The issue to be decided on appeal is whether the Labour Court should have upheld the appellant’s application to review and set aside the arbitration award. However, before doing so, I need to decide whether the appellant should be granted condonation for its failure to file, within the prescribed time, the record for the appeal, its power of attorney to prosecute the appeal and its heads of argument.

[17] The Rules that regulate proceedings in this Court provide that if an appellant fails to file the record for the appeal within the time prescribed, it is deemed to have withdrawn the appeal.¹ This Court has a discretion when deciding to condone the late filing of the

¹ See Rule 5(8) and rule 5(17). See also *Arnold Thshifhiwa Mulaudzi and 19 Others v Agricultural and Rural Development Corporation and Others* JA74/05 (unreported judgment) handed down on 19 November 2009 which provides at paragraph[4] as follows:

record or any other pleading or document. In exercising that discretion the court must consider a number of factors namely: the degree of delay and the reasons or explanation for the delay; the prospects of the party seeking the indulgence succeeding in its claim or defence; the prejudice that the parties will suffer if condonation is granted or refused; and finally, whether it is in the interest of justice to grant the condonation sought.²

[18] The degree of delay and the reason therefore complement each other. While the degree of delay is a mere arithmetic calculation, it is significant in relation to the expeditiousness with which the matter was required to be resolved. Hence, in matters where importance is placed upon the speedy and expeditious resolution of a dispute, even a short delay may not be excusable unless an explanation is proffered that sets out the reasons for the delay which the Court finds acceptable. With the factors of delay, go the prospects of success. Where it is evident that the party seeking condonation has no prospects of succeeding in its principal claim or opposition, no purpose is served in granting condonation and the Court must in such circumstance refuse to grant condonation irrespective of the degree of delay or the explanation provided. Where the

”Rule 5(17) of the rules of this Court provides that, if an appellant fails to lodge the record within the prescribed period, he/she will be deemed to have withdrawn the appeal. To avoid that the appeal be deemed to be withdrawn, the appellant may request the respondent within that period to consent to an extension of time. If the request for an extension is refused, the appellant may approach the Judge President of this Court for such extension. Where the appellant has failed to lodge the record within the prescribed period he is required to make an application for the condonation of his non-compliance with the rules of the Court and for the reinstatement of the appeal.”

² See in this respect *NEHAWU obo Mafokeng and Others v Charlotte Theron Children's Home* [2004] 10 (BLLR) 979 (LAC)

prospects of success are reasonably good or even fair then, depending on the delay and the explanation, consideration must be given to the prejudice that the parties may suffer before the discretion can be exercised on whether to grant the indulgence sought. The factor of prejudice plays a role only when the delay is substantial.

[19] Most applications for condonation fall within the above parameters. However, occasionally a dispute evinces such miscarriage of justice that it cries out for interference by the Court. In the matter of *NEHAWU o.b.o Mafokeng and Others v Charlotte Theron Children's Home*,³ this Court held that in an exceptional case, even where the delay may be substantial, the explanation for it less than adequate and the prospects of success indeterminable, sometimes it is in the interest of justice to grant condonation.⁴

[20] Where the matter deals with an individual dismissal, this Court must be cautious before exercising a discretion in favour of granting the indulgence sought because, there is an imperative placed upon the speedy and expeditious resolution of such disputes. In *Queenstown Fuel Distributors CC v Labuschagne NO and Others*,⁵ this Court held that:

“Condonation in the case of disputes of individual dismissals will not readily be granted. The excuse for non-compliance will have to be compelling, the case for the defect would have to be

³ See footnote 2 above.

⁴ In that matter the issue of race played a role in the dismissal and that called out for a proper determination of the matter, hence, even though the delay was substantial, the explanatory inadequate and the prospects of success indeterminable this court nevertheless granted condonation.

⁵ [2000] 1 BLLR 45 (LAC) at 53F-J

the kind which will result in a miscarriage of justice if it were allowed to stand.”

[21] As stated earlier in cases of individual dismissal, time is of the essence and a substantial delay even where the delay is explained is not itself sufficient to obtain condonation. Another obstacle to overcome is the decisions of this Court,⁶ that state that an applicant seeking condonation cannot rely on the negligence of its legal representatives as a reason for not complying with the prescribed time periods. In *Waverly Blankets*⁷ this Court went on to say that even where an attorney’s neglect of his client’s affairs may be inexcusable and “despite the blamelessness of the client” condonation could still be refused.

[22] It is also generally accepted that if an applicant does not provide an acceptable explanation for its delay, the court need not consider the other factors and refuse condonation.⁸ This again is not an inflexible rule. It applies where the other factors do not in themselves raise issues that could necessitate the Court’s interference to grant the indulgence sought.⁹

[23] In my view each condonation application must be decided on its own facts bearing in mind the general criteria. While the rules are there to be applied, they are not inflexible

⁶See for example *Waverley Blankets Ltd v Ndimma and Others* [1999] 11 (BLLR) 1143 (LAC) at 1145 I-J; *NUM v Council for Mineral Technology* [1999] 3 (BLLR) 209 (LAC) at 211I

⁷See footnote 6

⁸See for example *Moila v Shai NO and Others* [2007]5 BLLR 432 (LAC); *PPWAWU & Others v AF Dryer & Co. (Pty) Ltd* [1997]9 BLLR 1141 (LAC); *Toyota Marketing v Schmeizer* [2002]12 BLLR 1164 (LAC) at paragraph 15.

⁹As stated in *NEHAWU* (supra)

but the flexibility is directly linked to and apportioned in accordance with the interest of justice; prejudice; prospects of success and finally degree of delay and the explanation therefore. The issue of delay must be viewed in relation to the expedition with which the law expects the principal matter to be resolved.

[24] The delay in this matter was substantial. In respect of the filing of the record, this was filed approximately 18 months out of time; in respect of the heads of argument, this was filed approximately 7 weeks out of time; and, in respect of filing its power of attorney to prosecute this appeal, this was approximately 21 months out of time.

[25] The reasons preferred for the delay are the following:¹⁰

- (a) On 3 October 2007 the appellant was informed by its erstwhile attorneys that leave to appeal was granted and that the notice of appeal had been filed. (Leave to appeal was granted on 12 September 2007 and the appellant was required to file the record of appeal by 7 December 2007).
- (b) Upon enquiry the appellant was informed by its erstwhile attorneys that the appeal was under control.
- (c) Because the erstwhile attorneys were not forthcoming with any report as to how the appeal was progressing the appellant decided to communicate with its erstwhile attorneys in writing. On 18 August 2008, 1 September 2008, 16 September 2008,

¹⁰The appellant was granted leave to appeal on petition, until this was granted the appellant had adhered and complied with all the rules of the Labour Court including the prescribed time limits.

7 October 2008 it addressed letters to its erstwhile attorneys to enquire about the progress in the matter.

(d) The erstwhile attorneys responded to the appellant by stating that the appeal was proceeding unopposed and that it would let the appellant know as the matter progresses.

(e) In early 2009, the appellant again wrote to its erstwhile attorneys enquiring about progress in the matter. The attorneys responded by saying, inter-alia:

“2. We confirm that we made attempts to contact the Registrar of the Labour Court to arrange to have the matter set down.

Despite our valiant efforts we have not as yet been successful.”

(f) Further correspondence followed with the appellant seeking answers with little success and on 7 August 2009 the appellant terminated its erstwhile attorneys’ mandate and appointed the present attorneys of record.

(g) The erstwhile attorneys only released the appellant’s file to its present attorneys on 24 August 2009. The present attorneys, upon investigating the file, established that the record was not timeously filed. It duly filed an application to condone the late filing of the record and to reinstate the appeal.

(h) While preparing to draw the appellant’s heads of argument the present attorneys discovered that the erstwhile attorneys had not prepared a proper and complete record and that it had also failed to file a power of attorney. It then took immediate steps to correct the state of the record, file the power of attorney and then file its heads of argument.

[26] The explanation for the delay demonstrates that the appellant was misled by its erstwhile attorneys. The impression created by its erstwhile attorneys to the queries raised by the appellant was that all procedural aspects had been complied with; that the matter was not being opposed; and, that the only outstanding issue for the appeal was to be allocated a date for hearing; and, that it was the Registrar of this Court who was tardy in allocating a date for the hearing of the appeal.

[27] A few months after this, the appellant realised that something was amiss and appointed a new firm of attorneys to deal with its matter. It was only when the present attorneys took over the matter that the appellant realised the degree of the misrepresentations made to it and then expeditiously attended to this appeal.

[28] The delay in this matter is substantial and while the delay is explained, which explanation is acceptable consideration must be given to the other factors before the Court can exercise its discretion to grant or refuse the indulgence

[29] In determining the prospects of success (the merits of the appeal), I need to restate some of the facts and circumstances which are set out above, that is:

- (i) an advertisement was placed by the appellant seeking to fill the post of an internal investigator whose function would be to investigate wrongful and/or unlawful activities or misconduct committed by members of its staff;
- (ii) one of the minimum requirements to apply for the posts was the possession of a valid Code 8 driver's licence as the person appointed to the post may be required to travel out of office to conduct its investigation;
- (iii) the third respondent applied for the advertised post and in her CV which accompanied her application expressly represented that she had a valid Code 8 driver's licence;
- (iv) the appellant short-listed the third respondent and after conducting an interview employed the third respondent;
- (v) contrary to the representation, the third respondent did not, at the time of the application for the position and for months after being given the position, possess a valid driver's licence (she only had a learner's licence).

[30] The Commissioner found that the third respondent had committed a misconduct in not providing the correct information in her CV and concluded that her misconduct was not serious because: she did not intend to deceive the appellant; she had made an innocent error in failing to peruse her CV before handing it in with her application (the CV was typed by someone else); and the appellant suffered no prejudice. The Commissioner, therefore, found that dismissal was too harsh a sanction and found it to be unfair.

[31] A commissioner arbitrating a dispute is required to evaluate and analyse the evidence presented at the arbitration. It does not appear that he did so. A consideration of the record and the award reflects a mere acceptance by the Commissioner of the *ipse dixit* of the third respondent without any analyses or evaluation. It is also difficult to comprehend how the commissioner could accept the third respondent's explanation that her error was innocent without determining whether or not the explanation was in fact probable. The third respondent knew that a valid driver's licence was a pre-requisite for applying for the advertised post and her explanation for submitting a CV with the wrong information was simply so untenable that it ought to have been rejected as being wholly improbable. The third respondent testified that she knew that only those applicants in possession of a valid driver's licence would be considered for the post, she therefore knew that her application would not get off the starting blocks, had she simply stated that she was only in possession of a learner's licence. Her explanation that she failed to check her CV to ensure that it did not contain false information about meeting the requirements advertised cannot be accepted as being truthful.

[32] The improbability of her version is further compounded by her claim that while she knew that she did not possess a valid driver's licence, she was intent on applying for the post and indicating that she was only in possession of a learner's licence, but adding that she expected to be in possession of a valid driver's licence shortly. If that was what she had in mind in applying for the post, it would be all the more reason for her to ensure that her CV correctly reflected her intention.

[33] Had the commissioner properly considered the evidence, the inescapable conclusion he would have arrived at is that the respondent had deliberately misled the appellant.

[34] Furthermore the misconduct was indeed serious. This is evident from the consequence that followed the supply of the false information. It led to the third respondent being short-listed and being appointed at the expense of other properly qualified applicants. The unchallenged evidence of the appellant was that had it known that the third respondent only had a learner's licence, she would not be short-listed and therefore she would not be considered for the job. It appears to me that the Commissioner ignored the fact that it was a requirement of the job that the applicant for that post should possess a valid driver's licence. The Commissioner also ignored the provisions of the contract of employment. The provisions of the employment contract not only reinforced the fact that the applicant must be in possession of a valid driver's licence, but required this driver's licence as an integral part of the job specification to enable the incumbent to perform the functions allied to the post. The fact that the third respondent performed well at the interview and thus secured the post is irrelevant. It is also of no consequence as to how the discovery was made about her not having a driver's licence. To place an employee who was guilty of dishonesty back in her position where honesty and integrity is paramount to the execution of duties, is to my mind grossly unreasonable, but more importantly, it cannot be right and proper to reinstate or re-employ a person in a position

that was secured by the making of false statements. The third respondent secured for herself the post by falsely claiming that she had the minimum requirements for the position, in the circumstances, ordering her re-employment amounts to condoning her misconduct. This would mean that a candidate for employment can secure an advantage, to the prejudice of other applicants, by falsely claiming to have the minimum qualifications for the posts.

[35] To be dismissive of the third respondent providing false information renders the minimum requirement for the post irrelevant. It is certainly not for a commissioner to disregard the requirements of a post in conducting a misconduct hearing such as this.

[36] The Commissioner also misdirected himself in determining that the third respondent had been treated inconsistently. The third respondent claimed that the appellant had retained in its employ an internal investigator who was not in possession of a valid driver's licence. This was found to be untrue. There was an employee who was suspected of having a forged driver's licence. He was charged by the appellant and found not guilty by a properly constituted disciplinary enquiry. Hence, the question of inconsistency does not arise.

[37] In the circumstances, on the issue of the prospects of success, the appellant would succeed in reviewing and setting aside the award of the Commissioner on a number of grounds, primarily because of the Commissioner's failure to consider the evidence before

him properly or at all. Turning to the consideration of the prejudice that the parties will suffer if condonation is granted or refused, the appellant has been ordered to re-employ the respondent. If that order is allowed to stand, the appellant will have to back pay the appellant from the date of the award which is a substantial amount. The appellant is however the author of its own prejudice. The prejudice to the respondent on the other hand is substantial. She has an award in her favour and has waited for years for its implementation.

[38] As the Commissioner arrived at his decision without considering all of the evidence before him and he arrived at a conclusion that was not justifiable in relations to the evidence presented at the arbitration. In terms of the *Sidumo and Another v Rustenburg Mines Ltd and Others*,¹¹ this was clearly a decision reached by the Commissioner that a reasonable decision-maker could not have reached.

[39] The appellant has explained the delay. The delay was due to the fact that its erstwhile attorneys gave false reports to it about the progress of the matter. The appellant's conduct up to the date of granting of the petition cannot be ignored. It is clear that the appellant diligently persisted with the case from the very outset that the arbitration award went against it, to the time of the granting of the petition. What went wrong thereafter was ultimately the fault of the appellant's erstwhile attorneys. Although the delay is satisfactorily explained and the prospects of success favour the appellant,

¹¹ [2007] 12 BLLR 1097 (CC)

because this dispute deals with an individual dismissal I am of the view that this Court cannot come to the aid of the appellant unless this is a matter where the interest of justice demands the Court's intervention¹².

[40] This then leads to the crucial question of whether this is a kind of matter where the interest of justice demands that this Court intervenes and grants the condonation sought.

[41] The interest of justice is not a vague and catch all phrase that may be latched onto in order to justify one's own feeling of the inequity that may result if there is no interference from the Court. This factor must be utilised only where the absence of interference by the court would offend one's sense of justice. In the matter of *NEHAWU*,¹³ if the applicant was not granted condonation, it would not have been able to air an important issue of black staff not being allowed to mind white children, which goes against the constitutional imperative of equality to which all South Africans are bound. This case, though not in a similar league, if allowed to stand makes nonsense of an employer's right to set minimum and functional standards for each position it wants to fill. Furthermore it is not for a commissioner, in matters such as this, to appoint a person to a post who only qualified for the posts by making untrue claims in her application. In the circumstances, and also for reasons set out earlier, I am of the view that it is in the interest of justice to grant the indulgence to reinstate the appeal, and to condone the

¹² See the case *Queenstown Fuel Distributors CC* as quoted in paragraph [20] above

¹³ See footnote 2 above.

late filing of the power of attorney to prosecute the appeal and the heads of argument.

[42] The appeal is thus reinstated and as already stated this is a matter where the appeal should be upheld. The other outstanding issues are that of relief and costs.

[43] The appellant in its application for review prayed for the matter to be referred back to the CCMA to be arbitrated afresh by a commissioner other than the second respondent. I see no reason to do so. All the evidence the parties sought to lead was properly led, and based thereon there is only one conclusion that can be arrived at and that is that the dismissal was fair. I therefore see no reason to refer this matter back to the CCMA.

[44] With regard to costs, I am of the view that in terms both of law and equity there should be no order as to costs either in the Court *a quo* or in the appeal.

[45] In the result I make the following order:

- (i) The appeal is reinstated.
- (ii) Condonation for the late filing of the power of attorney and heads of argument is granted.
- (iii) The appeal is upheld and the order of the Labour Court is substituted with the following order:

“The arbitration award handed down by the CCMA is hereby reviewed and set aside and substituted with an order declaring the dismissal of J.B Leketi by the South African Post Office Limited, fair.”

- (iv) There is no order as to costs.

Waglay DJP

I agree

Tlaletsi JA

I agree

Musi AJA

Date of judgment : 3 August 2011

Appearances

For the appellant : Advovate T Motau

Instructed by : Mabuza Attorneys

For the respondent : Mr. L.L. Ledwaba of Ledwaba Inc.