REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case No. DA 4/09

In the matter between:

MOHAMED ISHACK SHAIKH **Appellant**

and

THE SOUTH AFRICAN POST OFFICE LIMITED **First Respondent**

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **Second Respondent**

COMMISSIONER P GOVINDSAMY **Third Respondent**

Heard: **12 November 2012**

Delivered: **19 July 2013**

Summary: **Appeal: Dismissal for misconduct – Considerably long delay in both filing notice of appeal and delivering appeal record – No sufficient cause shown for non-compliance with Rules and Court order – Condonation refused and appeal not reinstated – Accordingly, appeal dismissed.**

Coram: **Tlaletsi JA et Ndlovu JA et Landman AJA**

JUDGMENT

NDLOVU, JA

Introduction

[1] This appeal is against the judgment of the Labour Court (D Pillay J) which was handed down on 19 November 2008, in terms of which the Court *a quo* reviewed and set aside the arbitration award issued by the third respondent ("the commissioner") on 30 March 2006, whereby the commissioner found that the dismissal of the appellant was 'unfair' and ordered, amongst others, that he be reinstated 'on the same terms and conditions prior to his dismissal by no later than 2 May 2006.'

[2] Leave to appeal against the judgment was refused by the Court *a quo* on 2 April 2009. However, the appellant successfully petitioned this Court which, on 25 June 2009, granted him leave to appeal against the said judgment.

[3] In granting leave to appeal, the Court ordered the appellant, in terms of rule 4(9) of the Labour Appeal Court Rules, to deliver the appeal record within 60 days of the date of the order.[1] The appellant was, by virtue of rule 5(1), further required to file his notice of appeal within 15 days from the date of the order granting him leave to appeal.

[4] Having failed to file the notice of appeal and to deliver the appeal record as respectively required, the appellant filed three consecutive applications for condonation of his non-compliance with the prescribed time frames in that regard. These condonation applications, as well as the appeal on merits, were opposed only by the first respondent, the South African Post Office Limited ("SAPO").

[1] The 60 day period is also in line with the time frame prescribed for this purpose under rule 5(8).

Factual background

[5] During or about 1972, the appellant was employed by SAPO and he gradually climbed up the promotion ladder till he reached the position of the cluster postmaster stationed at Pietermaritzburg. Besides heading the Pietermaritzburg main post office, he also had oversight control over subsidiary or branch post offices falling under his cluster, which included Cumberwood, Luxmi, Willowton and Cascades.

[6] On 18 July 2004, the appellant was served with a notice to attend a disciplinary enquiry, having been charged with two counts of misconduct involving alleged incidents of sexual harassment in the workplace, against two female contract employees. The disciplinary hearing ran its course and culminated in the appellant being convicted as charged on both counts. On 14 October 2004, he was served with a notice terminating his employment with SAPO. He felt he was unfairly dismissed and thus referred a dispute to the first respondent ("the CCMA") for conciliation. When that process failed, the matter was referred to arbitration and presided over by the commissioner.

[7] As stated already, on 30 March 2006, the commissioner issued the award in favour of the appellant. This was after a lengthy arbitration hearing, consisting of at least some 12 witnesses for SAPO and three for the appellant, including himself. In terms of the award, the commissioner declared and ordered as follows:[2]

> '1. The Applicant's dismissal is unfair.
>
> 2. The Respondent is ordered to pay the Applicant back pay in the sum of R120 303-96 by not later than 30th April 2006.
>
> 3. The Respondent is ordered to reinstate the Applicant on the same terms and conditions prior to his dismissal by no later than 2nd May 2006.

[2] Of course, the parties, in terms of the award, were as designated at the arbitration hearing. The 'Applicant' is now the appellant and the 'Respondent' is now referred to as SAPO.

4. The Applicant is directed to report for duty at the Pietermaritzburg Post Office on 2nd May 2006.

5. There is no order as to costs.'

[8] SAPO was not satisfied with the commissioner's finding and referred the matter to the Labour Court for review, in terms of section 145 of the Labour Relations Act.[3] The review application was opposed by the appellant. After hearing argument, the Court *a quo* handed down its judgment in terms of which it ordered as follows: 'The application for review is granted with costs.' The effect of this order was that the dismissal of the appellant was declared to be fair and set aside the other ancillary relief granted to the appellant by virtue of the commissioner's award. It is against this judgment and order that the appellant now appeals to this Court.

[9] It is common cause that the appellant did not file the notice of appeal and did not deliver the appeal record, as required of him. Hence, he filed three consecutive condonation applications accompanied by supporting affidavits, in the following manner:

9.1 The first application filed on 8 July 2009, in respect of the late filing of the notice of appeal.

9.2 The second application filed on 16 November 2010, in respect of the late delivery of the appeal record, which was found to be incomplete and deficient and had to be withdrawn by the appellant.

9.3 The third application filed on 23 March 2012, in respect of the late delivery of the complete appeal record.

<u>The grounds of appeal</u>

[10] The appellant's grounds of appeal can be briefly summarised as follows:

[3] Act 66 of 1995

10.1 The Court *a quo* erred in failing to apply the appropriate standard and test laid down in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[4] in respect of judicial review of CCMA awards.

10.2 The Court *a quo* erred in going beyond the proper limits of a review court, more particularly by proceeding to examine the evidence, determine what her own conclusion would have been on that evidence, and then, in effect to reason that, because she would have arrived at a different conclusion, the decision of the commissioner must necessarily be one that a reasonable decision maker could not reach.

10.3 The Court *a quo* erred in adopting an entirely improper approach to the matter, more particularly by dealing with the matter as though it was an appeal and not a review.

The issues

[11] The following issues arise from the papers:

11.1 For preliminary consideration, whether the appellant's non-compliance with the Court order dated 25 June 2009 and the relevant Court rules, relating to the filing of the notice of appeal and the delivery of the appeal record, should be condoned and the appeal reinstated.

11.2 If condonation is granted and the appeal reinstated, then whether the appellant's dismissal was fair.

11.3 If unfair, what appropriate remedy the appellant is entitled to.

[12] For the sake of averting a piecemeal entertainment of the matter, the Court allowed counsel to proceed and present their arguments on both the issue of condonation and the merits of the appeal. Indeed, the Court received extensive submissions from counsel on both issues. Evidently, however, if the Court finds against the appellant in relation to condonation applications that will mark the end of the matter and the appeal will, in that event, fall to be dismissed.

[4] (2007) ILJ 2405 (CC) at para 110.

The appellant's applications for condonation of non-compliance with the Court order of 25 June 2009 and the Rules of the Court

[13] As stated already, this is an issue which warrants preliminary consideration by the Court. Rule 12(1) provides that '[t]he Court may, for sufficient cause shown, excuse the parties from compliance with any of these rules'.[5] This provision offers a clear indication that the Court is conferred with a discretionary power in determining whether or not to grant an application for condonation of non-compliance with the rules.[6] I now proceed to consider the issue of condonation.

[14] Rule 5(17) sets out the procedure to be followed by an appellant who fails to deliver the appeal record timeously in order to avert the inevitable consequence of having the appeal being deemed withdrawn. The rule provides as follows:

> '(17) 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 representative 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 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.'

[15] The following facts are common cause:

15.1 Leave to appeal was granted, on petition, by this Court on 25 June 2009.

[5] See also rule 27(3) of the Uniform Rules
[6] *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532C-F; See also *Chopra v Sparks Cinemas (Pty) Ltd and Another* 1973 (2) SA 353 (D) at 357A-B; *Gumede v Road Accident Fund* 2007 (6) SA 304 (C) at 307D-E.

15.2 The notice of appeal was due for filing by 16 July 2009, being 15 days of 25 June 2009.

15.3 The notice of appeal was filed on 8 July 2010 – some 12 months late.

15.4 The appeal record was due for delivery by 18 September 2009, being 60 days of 25 June 2009.

15.5 The incomplete appeal record was filed on 16 November 2010.

15.6 The complete appeal record was filed on 23 March 2012 – some 2 years 6 months late.

15.7 The appellant or his legal representative was not granted consent, by SAPO or its legal representative, for an extension of time to deliver the appeal record, nor did the appellant apply to the Judge President for such extension of time.

15.8 In the circumstances, the appeal was deemed to have been withdrawn (by the appellant) or to have lapsed.

[16] Mr Schumann, who appeared for the appellant, submitted that it was not only through the negligence of the attorneys (which was apparent from the appellant's affidavits) that such a considerable delay was caused in prosecuting this appeal but it was also clear that the financial circumstances of the appellant played a significant role in that regard.

[17] Counsel also implored us to take notice of the fact that the preparation of an appeal record was an extremely complex exercise, in that it is required to be done in a specific format which entailed, among other things, a specific method of cross-referencing. As a result, most attorneys did not even want to engage in that task, but simply referred it to certain firms of experts who specialised in the preparation of the appeal records for this Court.

[18] In alleviating any potential prejudice which SAPO might suffer as a result of the long delay, Mr Schumann submitted that, in the event of the appeal succeeding, the appellant was willing to make a tender to forfeit any back-pay

that he may otherwise be entitled to. In other words, the Court may make an order to the effect that any back-pay for the period commencing from the moment the appeal record should have been delivered to the time when it was actually delivered, must be excluded from the computation of any arrear salary due to the appellant. Mr Schumann submitted that at the end of the day the Court had a discretion on the issue of condonation and that such discretion was to be exercised in a manner which ensured that justice was done. He further contended that, notwithstanding the clearly negligent conduct of the appellant's erstwhile attorneys, this was a matter which warranted to be heard on the merits.

[19] Mr Myburgh SC, appearing for SAPO, pointed out, however, that it was significant to bear in mind that at all times the appellant was legally represented by attorneys and sometimes even advocates. He argued that the primary objectives of the LRA was to ensure an effective and expeditious resolution of labour disputes and, for this reason, it had to be more difficult to get condonation in labour law than in civil law, in individual dismissals such as in the present case. He submitted that there was no explanation whatsoever given for such egregious delay. Therefore, condonation should be refused and the appeal dismissed on this ground alone.

Analysis and evaluation

[20] Indeed, an application for condonation of non-compliance with the rules is not just a formality or merely something for the taking. A full and detailed account of the causes of the delay and the effect thereof must be furnished by an applicant.[7] The more serious the consequences of non-compliance, the more difficult it will be for the party seeking condonation to have his or her application granted.[8]

[21] Therefore, a party seeking condonation must, firstly, tender an explanation for the delay in order for the Court to understand fully how the non-compliance occurred; and secondly, show that the explanation so tendered is *bona fide*

[7] *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) at para 6.
[8] *Du Plooy v Anwes Motors (Edms) Bpk* 1983 (4) SA 212 (O) at 217C.

and not unfounded.[9] However, more importantly, when the failure to comply with the rules has been flagrant and gross, condonation will not be granted, regardless of the prospects of success on the merits of the case of the party seeking condonation.[10]

[22] It is trite that the primary objective of the LRA is to ensure that labour disputes are effectively and expeditiously resolved,[11] particularly those involving individual dismissals, such as the present case. This objective is not only in the interests of the dismissed employee but also in the interests of the employer. Just like the employee, the employer is entitled to have finality in the dispute. Either party is always likely to suffer prejudice if the finalisation of the dispute is unduly and unjustifiably delayed. Indeed, in conformity with the primary objective of the LRA aforesaid, rule 5(17) makes it clear that if the appeal record is not filed within 60 days the appeal is deemed to have been withdrawn by the appellant, or in synonymous terms, it is deemed to have lapsed.

[23] The element of effectiveness and expeditiousness in the resolution of labour disputes is also manifest not only at the appellate level but is clear from the inceptive stages of the resolution process. The LRA provides that the referral of a dismissal dispute to the CCMA or relevant bargaining council, as the case may be, must be made within 30 days of the date of the dismissal, or if it is a later date, within 30 days of the employer making a final decision to dismiss or uphold the dismissal.[12] An attempt at conciliation must be undertaken forthwith and the conciliation process must not take longer than 30 days to conclude, since the date of referral of the dispute. If the CCMA or the bargaining council certifies that the dispute remains unresolved, or if the dispute remains unresolved after the 30 day period has expired, the dispute may then, at the instance of the employee, be referred to the CCMA or the

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[9] Ibid at 218B. See also *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape)* 2003 (6) SA 1 (SCA) at para 11.
[10] See *Darries v Sheriff, Magistrates' Court, Wynberg and Another* 1998 (3) SA 34 (SCA) at 41D. See also *Ferreira v Ntshingila* 1990 (4) SA 271 (A).
[11] *Queenstown Fuel Distributors CC v Labuschagne N.O. and Others* [2000] 1 BLLR 45 (LAC) at para 25.
[12] Section 191(1)(b)(i).

bargaining council, for arbitration;[13] or to the Labour Court for adjudication;[14] depending on the nature of the reasons for the dismissal, as alleged by the employee.

[24] Once the arbitration process is set in motion, the LRA further stipulates that '[t]he commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and *quickly*, but must deal with the substantial merits of the dispute with the minimum of legal formalities.'[15] (My emphasis) Any party who feels aggrieved by the conduct of the arbitration proceedings may, within six weeks of receipt of the award, apply to the Labour Court to review and set aside the award concerned.[16] In *Queenstown Fuel Distributors CC v Labuschagne NO and Others(supra)*, the issue was whether the Labour Court had jurisdiction to deal with an application for review, where the application was submitted outside of the prescribed time limit of six weeks. In recognising the Legislature's intention to have the labour disputes, involving individual dismissals, resolved expeditiously, this Court stated:[17]

> 'By adopting a policy of strict scrutiny of condonation applications in individual dismissal cases I think that the Labour Court would give effect to the intention of the legislature to swiftly resolve individual dismissal disputes by means of a restricted procedure, and to the desirable goal of making a successful contender, after the lapse of six weeks, feel secure in his award.'

[25] On the basis of the aforementioned considerations, there needs, in my view, to be a differentiation in approach between condonation applications under labour law (the LRA), on the one hand, and under civil law, on the other, in that it should generally be more difficult to obtain the indulgence of condonation under the former, especially in disputes involving individual dismissals (not excluding mass dismissals in appropriate cases), than under the latter. In other words, condonation applications under the LRA need to be subjected to a strict judicial scrutiny test. Of course, every case will be

[13] Section 191(5)(a).
[14] Section 191(5)(b).
[15] Section 138(1).
[16] Section 145(1).
[17] Ibid at para 25.

determined on its own facts. As stated earlier, I reiterate, an application for condonation must not be a mere formality or something for the taking. In appropriate instances, such as the present, where there has been a considerably long and egregious delay in non-compliance with the rules, condonation should not be granted lightly. Therefore, whilst the Court has the discretionary power in relation to a condonation application, in such matters, the discretion should, in my view, be exercised less generously.

[26] In the affidavit (deposed to on 7 July 2010) supporting his application for condonation in relation to the filing of the notice of appeal, the appellant acknowledged the considerable lateness thereof. As stated, the notice of appeal was due to have been filed on 16 July 2009, but it was only filed on 8 July 2010 – some 12 months late.

[27] The appellant referred to a list of different attorneys whom he said he had instructed or approached in connection with this case, including the following: Attorneys Cajee Setsubi Chetty Inc.; Bhamjee Attorneys; Tomlinson Mnguni James Inc.; Attorney Navy Green Thompson; Shanta Reddy Attorneys; Farrell & Associates and Brett Purdon Attorneys. He detailed a variety of reasons why he withdrew from each attorneys' firm and instructed another – the reasons mostly being some sort of discontentment on his part with the manner in which the attorneys concerned handled the prosecution process of this appeal. Consequently, as he put it, '[t]he litigation to date has thus taken a severe toll on me, emotionally, physically and, probably most importantly, financially.'[18]

[28] Significantly, however, the appellant went on and averred as follows (underlined for emphasis):

> 'At this stage I pause to mention that all the while I was aware that the appeal record had to be delivered by a certain date, being a date falling sixty (60) days after the petition was granted, but I was not aware at this stage that a "Notice of Appeal" was to be lodged within fifteen (15) days of the same order. I only became aware of that fact much later as will be described below. Accordingly my notion of "lodging an

[18] Founding affidavit in re: First Application, at 14 para 22.

appeal" was the same as delivering the appeal record. With respect, until my present attorneys (Farrell & Associates) were instructed, no attorney I consulted advised me to the contrary."[19] (Underlined for emphasis)

[29] Concerning the delivery of the appeal record, the appellant initially stated:[20]

> 'I reasonably expect that the appeal record will be delivered within the next three (3) weeks of the filing of this (notice of) appeal and I respectfully pray that I be permitted to supplement this affidavit insofar as I must explain any further delays in the delivery of the appeal record which extend beyond that which I reasonably anticipate at this stage.'

[30] However, in the same affidavit, the appellant started to mention other logistical problems and financial hardship on his part which, I think, seemed to blur the 'reasonable expectation' that he is talking about in the quotation I have referred to in the preceding paragraph. He sought to draw attention to the fact that the transcription of the arbitration proceedings comprised 16 volumes and a total of some 1591 pages of evidential material. He continued as follows.[21]

> 'The quotations in respect of the work to be carried out in compiling the record of appeal induced a sense of great shock and despondency in me. At that stage it seemed to me that those costs would prevent me from carrying this matter forward. I certainly did not have the funds available to me and I would have to borrow money in order to further progress this matter. I was caused to debate how I could take this matter further forward…'

[31] In his second condonation application (filed on 16 November 2010) pertaining to the delivery of the appeal record, the appellant acknowledged that the record ought to have been delivered on or before 18 September 2009 and that it was then "almost 13 months (or 273 court days) late".[22] However, he purported to confirm that "the appeal record has been served and filed

[19] Founding affidavit in re: First Application, at 16, para 31.
[20] Founding Affidavit in re: First Application, at 11, para 14. As stated, the notice of appeal was filed on 8 July 2010. Therefore, the three weeks period referred to was to be calculated from that date.
[21] Founding Affidavit in re: First Application, at 26, para 53.
[22] Founding affidavit in re: Second Application, at 142, para 29.

simultaneously with this application in accordance with Rule 17 of the Rules for the Conduct of Proceedings in the Labour Appeal Court".[23]

[32] It is apparent from the papers that, as a result of a letter dated 7 February 2011 issued by the attorneys for SAPO in which they pointed out what they regarded as shortcomings and deficiencies in the appeal record delivered by the appellant on 16 November 2010, the appellant, on the advice of his then attorneys of record, withdrew the said record and, hence, sought further indulgence to be condoned in his late delivery of the fresh and complete appeal record.

[33] The appellant sought to place the blame squarely on his then attorney of record whom he had thought would attend to correcting the shortcomings and deficiencies in the record, which turned out that the attorney did not do.[24] He alleged he tried to contact the attorney at least 45 times from his two landline telephones and three times from his mobile phone[25] but without any meaningful success.

[34] It is, indeed, significant to note that the appellant was at all times represented by attorneys who were fully aware that the time had run out for the appellant in terms of compliance with the Court order and the rules. They were also fully aware of the potential disastrous consequences of such non-compliance. However, it is also noteworthy that the appellant acknowledged in his affidavit that all along '[he] was aware that the appeal record had to be delivered by a certain date, being a date falling sixty (60) days after the petition was granted',[26] and that '[his] understanding then, was that, since the appeal record was inevitably going to be late, condonartion must be sought in advance from the Labour Appeal Court as [he] had become accustomed to these 'condonation applications' during all of the prior proceedings in the Court a quo.'[27] In other words, there was no question of ignorance on his part in that regard. Despite his awareness, he continued dilly-dallying, chopping

[23] Founding Affidavit in re: Second Application, at 143, para 31.
[24] Founding Affidavit in re: Third Application, at 182 paras 31.
[25] Founding Affidavit in re: Third Application, at 182, paras 33, 34 and 35.
[26] Founding Affidavit in re First Application, at 16, para 31.
[27] Founding Affidavit in re First Application, at 17, para 34.

and changing the attorneys, until he had finally dealt with at least seven firms of attorneys over the same matter.

[35] I further observe that, despite the appellant having referred to a number of persons (mainly attorneys) in his explanation for the delay, not a single one of those people deposed to an affidavit confirming the appellant's averments. In an attempt to respond to that anomalous omission, the appellant had only this to say: 'My previous attorneys were obviously not in a position to provide confirmatory affidavits to my affidavit and thereby rendering their professionalism open to criticism'.[28] In my view, this is a feeble and lame excuse which cannot be accepted. If the appellant's reasons for the delay were *bona fide* and not unfounded,[29] it would reasonably be expected that he would obtain a confirmatory affidavit from at least one of the attorneys that he referred to. In the circumstances, it seems to me that the most plausible or probable explanation[30] for this omission is that the appellant was aware that none of the attorneys concerned would confirm his averments, which then further demonstrates a lack of *bona fides* on the appellant's part.

[36] The appellant's first attorney of record, Mr Praveen Thejpal, of the firm Attorneys Cajee Setsubi Chetty Inc., had in turn briefed advocate Peter Blomkamp to advise and represent the appellant with regard to the appeal. The appellant testified that Mr Thejpal served him well throughout the arbitration proceedings and in the review proceedings in the Court *a quo.* However, notwithstanding such commendable service, certain problems arose between Mr Thejpal and the appellant, regarding the preparation of the appeal record.

[37] According to the appellant, '[t]he magnitude of the task at hand in bringing the appeal caused our working relationship some distress. In particular, we were at loggerheads over whether the appeal record should consist of the full transcript of the arbitration proceedings and all bundles of documents presented at the arbitration proceedings, or whether it should consist only of

[28] Replying Affidavit, at 107, para 8.
[29] See *Du Plooy* (*supra*) at 218B.
[30] See *Cooper and Another NNO v Merchant Trade Finance Ltd* 2001 (3) SA 1009 (SCA) at para 7

the particular pages and documents upon which I would rely in an appeal.'[31] Consequently, on 4 September 2009, he addressed a letter to Mr Thejpal terminating his mandate to act for him. He then instructed Mr Yunus Bhamjee of Bhamjee Attorneys thenceforth to act for him.

[38] However, he was soon thereafter at loggerheads with Mr Bhamjee after the latter allegedly failed to attend properly to the issue of requesting the extension of time from SAPO's attorneys, to deliver the appeal record. Anyway, the real reason why the appellant left his previous attorney, Mr Thejpal, remains unclear, to say the least. I say so because when he became disgruntled with Mr Bhamjee the appellant, on 21 October 2009, reverted to Mr Thejpal who, strangely I would consider, wrote a letter 'as a gesture of goodwill' to Mr Bhamjee expressing concern in the apparent lack of progress in the prosecution of the appeal[32]. In that letter, Mr Thejpal actually referred to the appellant as his (Thejpal's) own client, which was factually incorrect.

[39] Indeed, in virtually every respect, the tone of Mr Thejpal's letter is as though he was the appellant's attorney and addressing the attorney for the other side. In this regard, I refer to the following passages in the letter:

> '3 … He (the appellant) is informed by you that the record will be compiled as required by the Labour Appeal Court and that an Application for Condonation will be lodged simultaneously with the record. *Client* asked me whether this is permissible and I told him that I have no idea whether this is permissible and that I do not know the rules in this regard and I will have to check with Counsel. Please make the necessary enquiries in this regard and reassure *client* that everything is in order as the anxiety is mounting and *client* has not been with an income for several years.
>
> 4. It would be appreciated if you could make the necessary enquiries regarding the future conduct of the matter and what is permissible and then discuss this fully with *client* and also telephone the writer to explain the above and I will also reassure the *client* based on the information received from you.' *(Emphasised).*

[31] Founding Affidavit in re: First Application, at 15, para 27.
[32] Mr Thejpal's letter is at pages 57 and 58 of the indexed papers.

[40] Then, if the appellant continued to utilise the services of Mr Thejpal, as he obviously did, and the latter continued to refer to the appellant as 'client', then it is difficult, and even curious, to understand why the appellant terminated Mr Thejpal's mandate, in the first place. I have serious doubt that Mr Thejpal continued to assist him on a free of charge basis. It would seem, therefore, that there was a period when the appellant was being simultaneously 'represented' by three legal professionals, namely, informally by Mr Thejpal and formally by Mr Bhamjee and Advocate Blomkamp. This fact and the fact that the appellant was legally represented all the time, since the arbitration proceedings, make it difficult to accept any purported excuse of an alleged dire financial straits on his part, as being a contributory factor in the cause of delay in delivering the appeal record.

[41] In any event, it is somewhat disingenuous of the appellant to mention (as part of the reason for the delay) the fact that the transcript of the arbitration proceedings comprised 16 volumes and a total of some 1591 pages of evidential material, as if he was totally financially responsible for the transcription of the arbitration record. It is common cause that most, if not the whole, of that record had already been previously transcribed at the instance of SAPO for the purpose of the review proceedings before the Court *a quo*. This averment by SAPO was never seriously challenged by the appellant but he merely raised a bare and bald denial in a manner that was conspicuously evasive and disingenuous.[33]

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[33] In its answering affidavit SAPO alleged, in clear terms as follows:

'4. … For the purposes of the review, the respondent [SAPO] had transcribed the record of the proceedings before the CCMA, and had collated and organised that record for the purpose of the review hearing. It had been indexed, paginated and the exhibits appropriately ordered for the purpose of that hearing. All that was required by the applicant (appellant ?) was to bring the form of that record into compliance with the Rules of Court pertaining to the appeal. This was neither onerous nor time consuming and ought to have been concluded well within the 60 day period that the applicant (appellant ?) had from the date of the granting of leave to appeal, being 25 June 2009. The applicant failed to do so, and failed further, when he was aware of his default, to apply for the necessary condonation.'

In response thereto, the appellant simply stated the following, in his replying affidavit:

'AD PARAGRAPH 4

11. The allegations herein are denied.

12. I submit that the process to compile the appeal record is not as simplistic as alleged by the First Respondent's attorney considering that I am a lay-person who is not of a legal mind or background.

13. I confirm that I have adequately set out the reasons for my delay in the affidavit in support of my condonation application.

[42] Indeed, it is deducible from SAPO's attorneys' letter dated 7 February 2011 that the incomplete record lodged by the appellant on 16 November 2010 (together with the second condonation application) was basically the same record which SAPO had delivered with its review application in the Court *a quo*. There was hardly anything to be added to that record by the appellant. In fact, the record so lodged was not only incomplete but it also lacked compliance with the specific guidelines relating to the preparation of appeal records for this Court.

[43] Consequently, it is difficult to comprehend why the complete record could not be delivered by the due date (i.e. 18 September 2009), in the first place, if it was already in the possession of the appellant's erstwhile attorneys. It was, therefore, even more bizarre and outrageous that when the record was delivered on 16 November 2010 (14 months later) it was still an incomplete record. I also observe that the notice of application accompanying the incomplete record is dated 4 November 2010, yet the papers were filed with the registrar only on 16 November 2010 – about two weeks later. In virtually everything, the appellant or his erstwhile legal team appeared to be completely unconcerned about compliance with the rules and the Court order of 25 June 2009. It is further noted that, despite clear opposition to the granting of condonation, the appellant's heads of argument filed on 18 May 2012 completely ignored that issue, and only dealt with the merits.

[44] Of further significance, there is no explanation why or how the appellant's erstwhile attorneys failed (1) to obtain consent for an extension of time from SAPO to lodge the appeal record outside of the prescribed time limit, or (2) to apply to the Judge President in chambers for such extension of time.[34] There was simply no explanation whatsoever why the appellant or his erstwhile attorneys failed to do all these things.

[45] The appellant's own handwritten letter dated 20 November 2009 addressed to the Judge President and purporting to apply for condonation is, indeed, an

[34] In terms of rule 5(17) of the Labour Appeal Court Rules.

interesting and curious inclusion in the papers.[35] It was date-stamped at Cumberwood post office, which coincidentally was one of the smaller post offices under the cluster control of the appellant.[36] As SAPO correctly responded, it was strange why a copy of the alleged letter was not forwarded to its (SAPO's) attorneys of record.[37] The appellant's lame explanation of ignorance (despite being legally represented) for this omission is not acceptable.

[46] It was also a strange unlucky coincidence for the appellant that an official named "Peggy" whom he allegedly dealt with at the Labour Appeal Court happened to have resigned just at the time when the appellant would have presumably sought her assistance to confirm, in an affidavit, her dealings with the appellant. In any event, the appellant does not allege that he made any attempts to trace the whereabouts of the said "Peggy" even after she had resigned. In my view, the appellant's allegations, in this regard, arouses further curiosity about his candidness and *bona fides*. It seems to me, on the preponderance of probability,[38] that the whole story about the alleged letter and, probably even about "Peggy", is only a convenient cover up by the appellant, aimed at hoodwinking this Court towards believing that he was earnestly concerned about the issues of extension of time and condonation. I am satisfied that he was not.

[47] In their letter of 7 February 2011, SAPO's attorneys pointed out several specific material shortcomings and deficiencies in the record filed by the appellant on 16 November 2010 and, in conclusion, urged the appellant's erstwhile attorneys as follows:

> '2. In the premises, we propose as follows:

[35] Founding Affidavit in re: First Application, at p18 para 37; Annexure "F", at 59 of the indexed papers.
[36] See para 5 above.
[37] In its answering affidavit, SAPO responded as follows:
> '25.1 The Respondent has no knowledge of the allegations in this paragraph, does not admit same and put(s) the Appellant to the proof there. It is strange that a copy of this alleged letter was not copied to the Respondent's attorney of record.
> 25.2 The allegations in respect of "Peggy" of the Labour Appeal Court constitutes hearsay evidence and is accordingly inadmissible.'

[38] See *Cooper and Another NNO,* above n 30.

2.1 You immediately withdraw the appeal record and Mr Shaikh's heads of argument (drafted with reference to an incomplete record), with wasted costs being reserved;

2.2 you compile a fresh appeal record, which should include the evidence of all the witnesses who testified before the CCMA and all of the documents referred to in evidence before the CCMA, and include the necessary cross-referencing referred to in para 4 above;

2.3 you deliver the fresh appeal record and the necessary application for the reinstatement of the appeal/condonation within one month; and

2.4 the registrar then be requested to issue a fresh directive regarding the filing of heads of argument.

3. We await to hear from you as a matter of urgency.'

[48] Despite the apparent kind gesture and assistance from SAPO's attorneys in their letter, quoted above, it took another 13 months for the appellant's attorneys of record to lodge the complete record on 23 March 2012. There is patently no explanation why it took such a long time to do so.

[49] On his own admission, the appellant was aware that the prescribed period within which to file the notice of appeal and to deliver the appeal record had expired and that it was necessary to file an application for condonation. However, he effectively sat back and did nothing about it but, instead, kept on chopping and changing the attorneys.

[50] I am also not convinced that the blame should be laid entirely at the door of his erstwhile attorneys for the whole delay and lack of progress in the prosecution of the appeal. It seems to me, based on his random and indiscriminate chopping and changing of attorneys, that the appellant was also personally to blame for his fate. As alluded to above, the shortage of funds was not such a serious problem for him as he now wants to have us believe.

[51] In any event, even if there was some degree of negligence of duty on the part of any of his erstwhile attorneys, this is, in my view, a typical case where the shifting of blame to an attorney cannot serve to absolve a litigant who, in a precarious moment, such as this one, decided knowingly to sit back passively behind the defence shield of a patently nonchalant and lackadaisical performance of his erstwhile attorneys. After all, in *Saloojee and Another v Minister of Community Development,*[39] the Appellate Division stated as follows:

> 'This Court has on a number of occasions demonstrated its reluctance to penalise a litigant on account of the conduct of his attorney.… I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. 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. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are. (Cf. *Hepworths Ltd v Thornloe and Clarkson Ltd.*, 1922 T.P.D. 336; *Kingsborough Town Council v Thirlwell and Another*, 1957 (4) SA 533 (N)). A litigant, moreover, who knows, as the applicants did, that the prescribed period has elapsed and that an application for condonation is necessary, is not entitled to hand over the matter to his attorney and then wash his hands of it. If, as here, the stage is reached where it must become obvious also to a layman that there is a protracted delay, he cannot sit passively by, without so much as directing any reminder or enquiry to his attorney (cf. *Regal v African Superslate (Pty.) Ltd., supra* at p. 23 *i.f.)* and expect to be exonerated of all blame;

[39] 1965 (2) SA 135 (A).

> and if, as here, the explanation offered to this Court is patently insufficient, he cannot be heard to claim that the insufficiency should be overlooked merely because he has left the matter entirely in the hands of his attorney. If he relies upon the ineptitude or remissness of his own attorney, he should at least explain that none of it is to be imputed to himself.'[40]

[52] The appellant did not only grossly and flagrantly flout the rules of this Court, but he also deliberately and knowingly disregarded the Court order of 25 June 2009. In my view, it is about time that litigants, such as the appellant, learnt a lesson to obey the orders and rules of the Court; and that failure to do so, without sufficient and just cause would potentially attract serious and unpleasant consequences for their default. In the present instance, it seems to me, even if the Court were to be lenient and condone the appellant's late filing of the notice of appeal but the virtually completely unexplained and unashamed egregious delay in the delivery of the appeal record is something not to be tolerated.

[53] The appellant sought to tender that, in the event of the appeal succeeding, he may, upon reinstatement, forfeit any back-pay that he may otherwise be entitled to. In that regard, it was submitted, the Court may make an order to the effect that any back-pay for the period commencing from the time the record should have been delivered to the time when it was actually delivered, must be excluded from the computation of any arrear salary due to the appellant. However, since the appeal has not succeeded, it follows that appellant's tender in this regard becomes irrelevant and falls away.

[54] In conclusion, the appellant has failed to show sufficient cause why his non-compliance with the rules and the Court order of 25 June 2009 should be condoned. Indeed, his failure in that regard was gross and flagrant and, as stated in *Darries and Ferreira,* above, condonation should not be allowed, regardless of the prospects of success on the merits of the appellant's case in the appeal. On this basis, the appeal cannot be reinstated. Consequently, there is no appeal properly before us. In the event, the appeal falls to be

[40] Ibid at 140H to 141H.

dismissed on this ground alone. There is, therefore, no need to deal with the merits of the appeal.

[55] Given the fact that the appellant lost his job and was without income for several years, and further that he apparently incurred huge expenses and costs, particularly in the form of legal fees, it seems to me just and equitable that he should not be burdened with further costs of the appeal. In my view, therefore, there should be no order as to costs of the appeal.

The order

[56] In the result, the following order is made:

1. The appeal is dismissed.

2. There is no order as to costs of the appeal.

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Ndlovu JA

Tlaletsi JA and Landman AJA concur in the judgment of Ndlovu JA

Appearances:

For the appellant:	Advocate PN Schumann
Instructed by:	Brett Purdon Attorneys, Durban
For the first respondent:	Advocate AT Myburgh SC
Instructed by:	Glyn Marais Inc, Sandton