

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no.: JA 109/2020

In the matter between:

**MEMBER OF THE EXECUTIVE COUNCIL:
POLICE, ROADS AND TRANSPORT
(FREE STATE PROVINCIAL GOVERNMENT)**

Appellant

and

**PUBLIC SERVICE CO-ORDINATING
BARGAINING COUNCIL**

First Respondent

DAVID PIETERSEN *N O*

Second Respondent

POPCRU obo RM MINNIE

Third Respondent

Heard: 31 August 2021

Delivered: 21 February 2022

Coram: Waglay JP, Jappie JA and Coppin JA

JUDGMENT

WAGLAY JP

[1] This is an appeal against the judgment of the Labour Court (Lawrence AJ) in terms of which the appellant's application for the review and setting aside of an award issued by the second respondent (the Commissioner) under the auspices of the first respondent (the Bargaining Council) was dismissed because the Labour Court denied the Appellant condonation for the late delivery of the review application. The review application was 14 days late.

[2] The Appellant also seeks condonation from this Court for the late filing of the notice of appeal and the record.

The background facts

[3] The Third Respondent (Mr. Minnie) was at all material times prior to his dismissal on 21 April 2016 employed by the Appellant as the Principal Provincial Inspector as well as the Traffic Examiner at the Appellant's Welkom Testing Station. On or about 16 September 2015, Mr. Minnie was charged for various acts of misconduct involving gross dishonesty arising from the fraudulent and corruptly issuing of driving licences and roadworthy certificates as well as breach of the National Road Traffic Act 93 of 1996.

[4] A disciplinary hearing was subsequently conducted against Mr. Minnie. He initially pleaded not guilty to the charges levelled against him and later admitted his wrongdoings as was alleged by the Appellant. He admitted to issuing driving licences and roadworthy certificates to various people without the necessary tests having been conducted. The Appellant sought his dismissal.

[5] The disciplinary hearing was chaired by one Mr. Mthembu, a Senior Attorney. His offices forwarded his disciplinary outcome ruling to the parties in terms of which he imposed a final written warning as the sanction. Soon thereafter he issued an amendment/variation of the sanction, imposing a sanction of dismissal. He prefaced the amended/varied disciplinary outcome with the explanation contained in the first two paragraphs which read as follows:

I hereby amend and vary the above which was erroneously sent to the parties. Upon my return to the office on 11 April 2016, I realised that the incorrect document, which was a draft report and some pages thereof were mixed up with those of an almost similar matter had been sent to the parties. I had not instructed my office to forward the documents as it was not yet completed. Inasmuch as Section 144 of the LRA empowers a commissioner to vary an award mero motu (by his own volition). Upon realizing an error in the award I submit that similarly, the chairperson of a disciplinary hearing can do the same thing. I hereunder set out to vary/ amend the outcome and sanction.”

[6] Following upon Mr. Mthembu's amended/varied disciplinary outcome report, Mr SJ Msibi, the incumbent Head of the Department (HOD), issued an undated notice of summary termination of employment to Mr Minnie, which the latter received on 21 April 2016.

[7] Mr Minnie decided to exercise his right to internally appeal the sanction of dismissal.

[8] The Collective Agreement regulates the issue of discipline and appeals at the workplace. Clause 8.2 of the Agreement provides that:

The employee must within five working days of the receiving notice of the final outcome of a hearing or other disciplinary procedure, submit the appeal form to her or his executing authority, or to her or his manager, who shall then forward it to the appeal authority.”

[9] It was common cause that the Mr. Minnie lodged the appeal form with one Mr Bangane, the Senior Labour Relations Officer, on the final day of the prescribed time period. There is no evidence or submissions made to the commissioner that Mr Bangane was either, Mr. Minnie's manager, or the executing authority as required by clause 8.2 of the Agreement. Mr. Bangane did forward the lodged appeal to the office of

the Member of the Executive Council (MEC) a few days later. The office of the MEC recorded that the appeal was lodged with it on 4 May 2016.

[10] Between 4 May 2016 and 28 November 2016, there was a change in the executing authority for the Department in terms of which the previous MEC was replaced by a new MEC. The change, it appears, delayed the finalisation of the appeal. The MEC only dealt with and responded to Mr Minnie's appeal on 28 November 2016. The MEC's letter dated 28 November 2016 reads, *inter alia* as follows:

'1. I refer to your appeal which was submitted to the office of the MEC on the 4th of May 2016 (Hon. MEC Kompela). Your appeal has now been handed to me for consideration and decision.

2. I have noted that you were served with a letter of dismissal on the 21st of April 2016 and that you subsequently submitted your appeal on the 4th of May 2016. In terms of clause 8.2 of the disciplinary code and procedures in the Public service (i.e the PSCBC Resolution 1 of 2003) an appeal must be submitted to the employee's executing authority or to the employee's manager within five (5) working days of receipt of the final outcome of the disciplinary hearing. Your five (5) working days expired on the 28th of April 2016 and therefore, you have submitted your appeal about four (4) days late. Your appeal was not accompanied by the application or request for condonation as provided in clause 8.3. of the disciplinary code and procedures of the public service.'

Bargaining Council Referral

[11] Following upon the appeal outcome, Mr. Minnie referred the dispute of an unfair dismissal to the Bargaining Council. He, however, did not refer the dispute timeously. His referral was accompanied with an application to condone the late referral. On 17

April 2017, the Bargaining Council dismissed the condonation application and with it, the Third Respondent's dismissal dispute was automatically dismissed.

[12] On 18 May 2017, Mr. Minnie instituted an application for the rescission of the ruling on the grounds of common mistake. This rescission application was also dismissed.

[13] Following upon the unsuccessful prosecution of the dismissal and the rescission applications, on 3 June 2017, the Third Respondent changed course and lodged a dispute about interpretation or application of the Collective Agreement in terms of section 24 of the Labour Relations Act (LRA).

[14] The parties held a pre-arbitration conference. The minute of the conference reflects that:

14.1. The issues in dispute were whether the Appellant had an obligation to consider the appeal, if so whether the Mr. Minnie complied with the time limits imposed by the collective agreement, whether section 144 of the LRA applies to chairpersons of the disciplinary hearing and whether the Chairperson is entitled to rescind a sanction which he imposed.

14.2. Among the facts that were recorded as being common cause was the fact that the Mr. Minnie was already dismissed by the Appellant.

[15] The aforesaid referral culminated in an arbitration hearing which was held before the Commissioner on 29 August 2017.

[16] The Commissioner heard no evidence despite there being factual disputes about *inter alia* whether the lodging of the appeal to Mr Bangane was indeed a proper appeal, the status of the findings of the chairman of the hearing and in particular whether or not he had in fact authorised the release of the erroneous ruling in the first place and the circumstances for the delay in finalising the appeal.

[17] During the process of narrowing the issues, Mr Lebea for the Appellant placed on record that the issue relating to the interpretation question which was before the arbitrator for determination had been rendered academic given that the dismissal was confirmed and the unfair dismissal claim dismissed.

[18] The Commissioner nevertheless recorded that the first issue to decide is whether the employer had the obligation to consider the appeal which was lodged by Mr Minnie.

[19] Neither party led evidence and the parties agreed to submit heads of argument to the Commissioner.

Award

[20] The Commissioner curiously assumed jurisdiction over the matter. He found that the Chairperson was not entitled to rescind the initial ruling and that the appeal had been timeously lodged. He, accordingly, ordered the MEC to consider the appeal on the merits and ordered payment of the Third Respondent's salaries from 1 June 2016 to 30 September 2017 pending the outcome of the appeal.

The judgment of the Labour Court

[21] The Appellant sought to review and set aside the award but launched its review application outside the prescribed time limit imposed by the LRA. It did however apply for condonation for its late launching of the application which was 14 days late.

[22] The Labour Court refused the application for condonation as it found that the explanation for the delay was unsatisfactory and the prospects on review were poor. The court further misconceived the Appellant's argument that the matter before the commissioner was moot because he could not enquire into or pronounce on the collective agreement with respect to Mr. Minnie's appeal because he had been dismissed and worst still his unfair dismissal claim had been finalised.

[23] The Labour Court, like the commissioner who arbitrated the dispute, simply missed the point, namely, that one cannot look into the merits of the application of a collective agreement to an employee who is no longer one, because it is a purely academic exercise.

The appeal: explanation for the delay of 8 months and 17 days and the late delivery of the record

[24] Having been granted leave to appeal to this Court the Appellant failed to file its notice of appeal and the record timeously. It applied for the condonation of their late filing.

[25] The reasons for the delay, which was just under nine months, were set out in detail. It was said that after receiving the judgment from the Labour Court, the Appellant's attorneys immediately applied for leave to appeal. Thereafter, on 4 October 2019, the Appellant's attorneys transmitted the full judgment of the Court *a quo* as well as the application for leave to appeal to a Mr Monyane the director of legal services of the Appellant. The email which was transmitted by the Appellant's attorneys reads *inter alia* as follows:

'Dear Mr Monyane

1. We refer to the above matter and enclose herewith the Court's signed judgment as well as the Notice of Application for Leave to Appeal as per your request.

2. Kindly confirm receipt.'

[26] Whilst awaiting the judgment and order on the Appellant's application for leave to appeal, the Appellant's attorneys of record received by email an unsigned letter dated 27 November 2019 from Mr Monyane. The aforementioned letter from Mr Monyane reads *inter alia* as follows:

- ‘1. We acknowledge receipt of your bill of costs dated 9th of October 2015 and the contents thereof are noted.*
- 2. We confirm our instructions [to you] were to handle the matter in as [far as the] condonation application is concerned.*
- 3. After we learnt of the judgment, our instructions were for you to obtain the full judgment in order to advise the Head of Department.*
- 4. We have noted that you charged items 6, 8 and 9 which you have no mandate on them, therefore revise your account and withdraw the Application for leave to appeal.*
- 5. Upon receipt of your revised bill of costs and notice of withdrawal of leave to appeal then your account will receive our attention.*
- 6. We hope you will find the above in order.’*

[27] The deponent to the founding affidavit in support of the condonation application, Mr Mtakati, who is the Appellant’s Accounting Officer and Head of Department, stated that he never instructed Mr Monyane to write the letter nor was the correspondence in question shown to him prior to it being transmitted to the Appellant’s attorneys of record (hereafter Mr. Lebea). He states under oath that it does appear to him that Mr Monyane was dropping his name in the course of pursuing a position in respect of which he had no mandate. For example, he says that Mr. Monyane had no authority to instruct Mr Lebea to withdraw the application for leave to appeal or to refuse to pay his fees in respect of lodging the application for leave to appeal. He also had no authority to attempt to repudiate the mandate which was given to Mr Lebea to take the arbitration award on review and to limit this overall mandate to only the condonation application.

[28] It seemed to him that Mr Monyane’s actions were directed at serving and protecting the interests of Mr. Minnie and not the Appellant’s best interests. In fact, Mr

Monyane's actions were calculated to jeopardise and harm the Appellant's interests whilst they simultaneously benefitted Mr. Minnie.

[29] Mr Lebea furnished Mr Mtakati with a copy of their response dated 13 December 2019 to Mr Monyane's aforementioned letter. It is a detailed response wherein he *inter alia* records that Mr Monyane had in fact approved the application for leave to appeal and that he was prepared to work on a contingency basis to prosecute the appeal provided arrear fees are not affected by the arrangement.

[30] Gleaning from the correspondence from Mr. Lebea, Mr Mtakati avers that it is quite clear to him that the failure by the Appellant to lodge its notice of appeal and to further prosecute the appeal was single-handedly sabotaged and hampered by Mr Monyane. Clearly, Mr. Monyane did not want the appeal process against the judgment and order by Lawrence, AJ to be proceeded with.

[31] On 11 February 2020, Mr. Lebea transmitted an email to Mr. Monyane which states, in part:

- '1. We refer to the above matter and enclose herewith the Labour Court's judgment granting the Department leave to appeal to the Labour Appeal Court.*
- 2. Kindly be advised that the Department must file its notice of appeal on or before the 26th of February 2020.*
- 3. In the light of the above, kindly advise if we should proceed to file the notice of appeal. It will be appreciated if we were to receive such instructions on or before Thursday, the 13TH of February 2020 so that we may start drafting the papers timeously.'*

[32] Mr Monyane has never responded to the letter. This was despite Mr Mtakati's specific instructions to Mr Monyane that he should instruct Mr. Lebea to proceed with the lodging of the notice of appeal. Due to the threats of non-payment of fees and

disbursements contained in Mr Monyane's letter dated 27 November 2020, Mr. Lebea could not take the risk of lodging an appeal without receiving specific instructions to note and further prosecute the appeal.

[33] Mr Mkataki states that all material times from when he received the email dated 11 February 2020 and the subsequent discussions he held with Mr Monyane, to the date on which Mr. Minnie's application for contempt was brought to his attention on 7 December 2020, he laboured under the genuine and sincere but mistaken belief that the appeal had been properly noted and was being proceeded with in the normal course.

[34] He was disabused of the aforementioned erroneous impression when he contacted Mr Lebea on 9 December 2020 and enquired about the progress of the appeal and was told that the appeal was never noted due to lack of the necessary instructions from the Appellant.

[35] It was then that he immediately gave Mr. Lebea instructions to lodge the notice of Appeal and to bring the necessary application for the late filing of the Notice of Appeal.

[36] It further appears from the answering affidavit in opposition to the application for condonation that Mr Monyane was in constant contact with Mr. Minnie promising him that the leave to appeal would be withdrawn. This communication was occurring without the knowledge of Mr Mtakati or Mr. Lebea. The *WhatsApp* communications in any event make it clear that Mr Monyane did not have the authority to make such a decision and needed to obtain a decision from the HOD, Mr Mtakati.

[37] A virtual meeting was held between Mr Monyane, Mr Mtakati and Mr Minnie on 16 September 2020 and Mr. Minnie sent Mr Mtakati an SMS on 11 November 2020 to persuade Mr Mtakati not to go ahead with the appeal. Mr Minnie on his own version appears to concede that he did not persuade Mr Mtakati not to proceed with the appeal. Mr Mtakati further states that despite the SMS he had been under the *bona fide* impression that the notice of appeal had been served. The meeting and SMS both serve to confirm that Mr Mtakati was not budging and wanted the appeal to proceed.

[38] It would have been clear to both Mr Monayne and Mr Minnie that Mr Mtakati wanted the appeal to go ahead, and, in these circumstances, Mr Monyane was duty-bound to have instructed Mr Lebea to deliver the notice of appeal. He failed to do so. Mr Mtakati, on the other hand, genuinely believed that Mr Monyane had instructed Mr Lebea to deliver the notice of appeal.

[39] Based on the above explanation, it is submitted that the delay in filing the Notice of Appeal was not occasioned by either remissness or negligence on the part of the Appellant or on part of its attorneys of record. On the contrary, the Appellant's attorneys of record advised the responsible official, Mr Monyane, timeously of the time periods for the lodging of the notice of appeal and the necessity of furnishing them with the necessary instructions promptly so that they draft the notice of appeal in time but were never furnished with any instruction until the time to do so expired.

[40] The delay in lodging the notice of appeal is therefore singularly, directly and wholly attributable to Mr Monyane's actions which were intended or calculated to prejudice the best interests of the Appellant and simultaneously benefit Mr Minnie given the egregious conduct of Mr Minnie which, it must be said was nothing short of disgraceful and dishonest and which conduct was admitted by him. In the circumstances, one would have expected the Appellant to resist any attempts by Mr Minnie to utilise technicalities to get his job back. It does appear from the papers that Mr Monyane's actions were irresponsible, completely unexpected and beyond the Appellant's control.

[41] Given the egregious nature of the offences for which Mr Minnie was dismissed, one can hardly find fault with the Appellant's disappointment with Mr Monyane or its persistence with this appeal.

[42] As for the condonation for the late filing of the record, the application is unopposed. The explanation here is the same as recorded above which applied for the late filing of the notice of appeal. The record would have been timeously delivered but for the attempts by Mr Monyane to undermine to appeal process.

[43] In the matter of *South African Post Office Ltd v Commission for Conciliation Mediation and Arbitration and Others* (JA 56/06),¹ this Court in dealing with the explanation for the late filing of the record of the appeal, not dissimilar to the present matter, said what is of appropriate application to this matter. It said:

[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 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 seven 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...

[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.

[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

¹ [2011] ZALAC 16; [2012] 1 BLLR 30 (LAC); (2011) 32 ILJ 2442 (LAC) (3 August 2011)

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, 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 intervention.

[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*, 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 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.'

Review to the Labour Court: explanation for the delay of 14 days

[44] Turning to the merits of the appeal, the Court *a quo* was unnecessarily critical and pedantic when rejecting the explanation for the delay of 14 days. The explanation was supported by the affidavit of Mr R Thekiso the chief director and the confirmatory affidavit of Mr Lebea, an Officer of the Court and there was simply no basis to reject it.

[45] A copy of the Second Respondent's arbitration award was transmitted to the Appellant on 27 September 2017 and was also transmitted to Mr Lebea of the Appellant's attorneys of record on the same date.

[46] About two days after the receipt of the arbitration award, Mr Lebea advised the Department that the Second Respondent's arbitration award was *prima facie* reviewable, but he could not undertake any work regarding the drafting of the review application until he had been duly appointed by the Department to do so. Self-evidently, he would have needed instructions to challenge the award. However, the Department had to comply with its Supply Chain Management Policy ("*the SCM Policy*") prior to the Appellant's attorneys of record being appointed to draft the review application. Mr Lebea indicated that he would not be immediately available to draft the review application due to prior commitments but would be available in or during the last week of October 2017.

[47] Mr Lebea has been involved in the matter both in the disciplinary hearing and in the arbitration hearing. He was quite familiar with the facts and there were facts pertaining to this matter that were peculiar and only known to him. This was the factor which the Department considered when exploring if another firm of attorneys could be appointed. Mr Lebea would still have been required for consultation with the new attorneys if such a decision was taken.

[48] The Department then decided that it would be prudent and cost-effective to instruct an attorney who has already been running with the matter. Consequently, Mr Lebea was appointed on 23 October 2017 to institute the review application. As already indicated, due to prior commitments, Mr Lebea was only able to commence with the drafting of the review application on 30 October 2017. He finalised the drafting of the review application on 6 November 2017 and the founding affidavit was transmitted to the Department for signature by the incumbent HOD, Mr SJ Msibi.

[49] After making numerous enquiries about the signed and commissioned founding affidavit of Mr Msibi, on 10 November 2017, Mr Lebea was advised that Mr Msibi was on sick leave and that he would be advised of the name of the Acting HOD.

[50] On 15 November 2017, Mr Lebea was ultimately advised that a new Acting HOD of the Department had been appointed. On learning of the aforesaid appointment, Mr Lebea advised that he would have to change the deponent to the founding affidavit as well as amend the founding affidavit to include the application for condonation.

[51] Mr Lebea finalised the amendment of the draft founding affidavit on 21 November 2017 and all the affidavits, including the founding affidavit, were expected to be finalised and the entire application to be served and filed by Wednesday, 22 November 2017.

[52] Mr Lebea has however advised that upon proper calculation of the time period, the review application ought to have been filed with the Honourable Court on or before 8 November 2017. The period of delay if the review application is filed on 22 November 2017 will be 13 days including weekends and 9 days excluding the weekends. Mr Lebea further advised that he would add the condonation application to the original affidavit supporting the application.

[53] Based on the above explanation, we find that the delay has not been occasioned by either remissness or negligence on the Appellant's part or on the part of the Appellant's attorneys of record. On the contrary, the Appellant and its attorneys of record exercised all the necessary diligence in prosecuting the review application

including the application for condonation and they have taken diligent steps to lodge the application.

The prospects of success and review merits

[54] In considering the prospects of success, the Court *a quo* committed a number of fundamental misdirections and errors of law and failed to deal with material grounds of the review.

[55] There are three difficulties with the Bargaining Council considering the second dispute, the unfair labour practise dispute, (ULP) under the guise of an interpretation dispute.

[56] First, the referral of the ULP dispute was plainly outside of a reasonable time. The Court *a quo* simply failed to deal with this point even though it is specifically pleaded and goes to jurisdiction. This alone warrants a reconsideration of the condonation application and merits the upholding of the appeal on the merits. If this point is upheld, it is not necessary to deal with any of the further points addressed in these submissions.

[57] In *Health & Other Services Personnel Trade Union of SA obo TS Tshambi vs Department of Health, Kwazulu Natal*,² this Court held:

[32] It is not strictly necessary to address the Arbitrator's flawed rationale that because a dispute, purportedly contemplated by section 24 dispute, resembles a money claim, and because section 24 does not prescribe a time period for referral, therefore that dispute is subject to a prescribed period for referral as determined by the Prescription Act. Nevertheless, it is appropriate to deal with such flawed thinking in order to inhibit any repetition. Axiomatically, the arbitrator missed the point about determining a reasonable period by thinking the Prescription Act prescribed a period. Perhaps a generous reading of his

² [2016] 7 BLLR 649 (LAC) ; (2016) 37 ILJ 1839 (LAC).

ruling could be that, by analogy, inspiration could be derived from the laws about prescription of money claims to assess reasonableness. However, what constitutes a reasonable time within which to refer a true labour dispute is dictated by the expectations to be derived from the LRA not from civil litigation. A true money claim belongs to civil litigation and insofar as such a claim is covered by section 77 of the Basic Conditions of Employment Act 75 of 1997, which confers concurrent jurisdiction on the Labour Court to hear certain civil claims, the Labour Court could hear the case and Prescription Act would prevail in such a context. The use of analogy must be tempered by an appreciation of the context and functionality of the procedures and remedies provided in the LRA. In true labour disputes, the provisions of section 191(1) of the LRA are a more obvious general yardstick to test what is a reasonable time for a referral. The absence of a prescribed period does not automatically license a longer period than is the norm for other labour disputes to be referred. In labour disputes, expedition is the watchword, not because that is simply a good idea, but because the prejudice of delay in matters concerning employment often is not capable of remedial action. This applies to both employees and employers. The appropriate enquiry is into the history of the engagement between the parties about the controversy, and the elapse of time since engagement to resolve the controversy ceased. Self-evidently, the ultimate decision on reasonableness has to be fact-specific. A lapse of 692 days in respect of a failure to pay a salary is a remarkably long time. On this record, nothing said provides a convincing rationale why the delay was unavoidable.'

[58] The yardstick for a dispute to be referred to the Bargaining Council/CCMA in section 191 is 30 days. Here, the decisions in issue took place on 6 April 2016 (the ruling of the Chairperson) and 28 November 2016 (the appeal). Indeed, the ultimate controversy in this matter arose only because the Mr. Minnie was dismissed.

[59] The dispute was only referred on 3 June 2017 well outside a reasonable time.

[60] Simply applying the judgment of the LAC in *Tshambi* should have resulted in this review succeeding as the Court *a quo* was bound by the judgment. The referral was late there was no accompanying application for condonation and the arbitrator accordingly lacked jurisdiction over the dispute. To hold otherwise would negate the imperative to resolve dismissal disputes expeditiously and undermine an employer's right to finality.

[61] Second in an extract from the judgment in *Tshambi* *supra*, the court *a quo* also held that "a dispute about the interpretation of a collective agreement requires, at minimum, a difference of opinion about what a provision of the agreement means". There was no difference about the interpretation of the collective agreement at all. The substance of the dispute was a dismissal. Nothing more nothing less.

[62] Third and most crucially, even if notionally one could separate a claim for specific performance from a dispute about interpretation, Mr Minnie's dismissal for dishonesty had been confirmed. The unfair labour practice he sought to challenge was thus moot. There was simply no basis in these circumstances to consider the unfair dismissal dispute referred by Mr Minnie as his dismissal had already been confirmed by the Appellant and his referral of the dispute to the Bargaining Council dismissed and therefore finalised. In the circumstances, a favourable result concerning the hearing of the appeal by the employer was totally irrelevant, it may have been an issue relating to procedural fairness in his dismissal dispute but in that regard the horse had already bolted.

Conclusion

[63] On this basis, the appeal should succeed. It is not necessary to deal with the other points raised on appeal.

[64] The late delivery of the notice of appeal and record should be condoned in the interest of justice. The appeal should be upheld, and the Court *a quo*'s decision should be substituted with an order condoning the late delivery of the review application, upholding the review and dismissing the Third Respondent's referral.

[65] In the result, I make the following order:

- (i) The late filing of the Notice of appeal and the record is condoned and the appeal is reinstated;
- (ii) the appeal succeeds and the order of the Labour Court is substituted with the order that condonation for the late filing of the review application is condoned, the review upheld and the award issued by the commissioner is set-aside and replaced with the order that the referral is dismissed.
- (iii) there is no order as to costs.

Waglay JP

Jappie and Coppin JJA agreed

APPEARANCES:

FOR THE APPELLANT:

FA Boda SC

Instructed by Lebea and Associates Attorneys

FOR THE THIRD RESPONDENT:

Mr Mashaba of Mashaba Attorneys