

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
(HELD AT PORT ELIZABETH)**

CASE NO: PA 1/97

IN THE MATTER BETWEEN:

NEHAWU

APPLICANT

AND

MICHAEL NYEMBEZI

RESPONDENT

JUDGMENT

KROON JA:

[1] On 11 February 1999 this Court issued an order dismissing an application for the condonation of the failure to comply with the relevant rules of court relating to the noting and prosecution of an appeal against a decision of the industrial court. The dismissal of the application carried with it an order for costs, to include the costs incurred in connection with the appeal. It was intimated that the reasons for the issue of the order would be furnished later. These are they.

[2] In terms of the then applicable rules of the industrial court the appeal should have been noted within 14 days of 27 November 1996. It was in fact noted on 8 January 1997.

[3] The affidavits filed in support of the application for condonation of the late noting of the appeal advance as reasons therefor the need to secure, and the delay in securing (due to certain logistical problems), the approval of the applicant's National Executive Committee for the appeal to be noted; the unavailability for a period thereafter of the applicant's attorney; the closure thereafter of the attorney's offices for a period during the holiday season; and the ignorance of the applicant's representative of the time limit prescribed by the

rules in respect of the noting of the appeal.

[4] In some respects the explanation tendered is unsatisfactory. E.g., it is not explained why the applicant did not seek the assistance of one of the partners of the attorney whom it wished to engage. On balance, however, it may be accepted that the explanation passes muster.

[5] However, what is not explained is the delay in filing the application for condonation of the late noting of the appeal. In common with other courts this Court has laid down that an application for condonation should be filed as expeditiously as possible after the need to seek condonation arises. See, e.g., **All Round Tooling (Pty) Ltd v NUMSA** [1998] 8 BLLR 847 at 849H-J. The relevant notice of motion is dated 20 February 1997, itself a date considerably long after the date by which the appeal ought to have been noted. The application was, however, not filed then. That only occurred after 15 April 1997, the date on which the supporting affidavits were attested. No explanation for this delay was forthcoming, and it cannot accordingly be condoned.

[6] The power of attorney to note and prosecute the appeal was (a) filed out of time (it was dated 10 April 1997), and (b) referred to an appeal to be heard in the relevant provincial division of the former Labour Appeal Court. No condonation for these defects was sought and accordingly none can be granted.

[7] Condonation is, however, further sought in respect of the late filing of the record on appeal and of the applicant's heads of argument. The former was required, in terms of the relevant rules, to have been filed within 60 days of the noting of the appeal. It was in fact only filed during August 1998. That the delay in question was exceedingly long is manifest. The explanation proffered therefor may be summarised as follows:

(a) The request of the applicant (through its attorneys) for the record and tapes of the proceedings in the industrial court was not made until more than a month after the date on which the record should have been filed. Initially the request was directed to the wrong court.

(b) Financial constraints prevented the applicant from being in a position to pay for the transcription of the evidence given in the industrial court until the end of January 1998; the transcription itself was received on 10 February 1998.

(c) The record could, however, not be filed at that stage because copies of the exhibits had to be prepared and the applicant's attorneys had not yet been placed in possession of the pleadings and other documents filed of record in the industrial court. Same had to be obtained from the registrar of the industrial court in Pretoria. There followed, over a period of some months: the filing of a record that was not bound, paginated or indexed; the retrieval thereof by the applicant's attorneys; delays in forwarding the record for binding and pagination and delays, after receipt of the properly prepared record, in the filing thereof.

The heads of argument, which should have been filed by 27 November 1998, were in fact filed on 2 December 1998. The explanation therefor was, in short, that counsel could only be briefed on 25 November 1998 to draft the heads of argument by reason of the applicant's failure, despite repeated requests from its attorneys, over an extended period of some months, to make the required funds available to its attorneys. That failure was in turn ascribed to the financial constraints under which the applicant was labouring.

[8] The application for condonation of the late filing of the appeal record and of the applicant's heads of argument was only filed on 5 February 1999, i.e., four court days before the date assigned for the hearing of the appeal, and a considerable period after the need to seek condonation in both respects arose.

[9] The following comments fall to be made:

(a) Whatever the financial constraints under which the applicant was labouring, the inference from the papers is that it deliberately chose to make the appeal in this matter subservient to other demands on its resources; this applied both to its duty to file the record and to enable counsel to be briefed timeously to permit of the heads of argument to be filed by due date. It is not unfair to hold that the applicant should bear the consequences of that deliberate decision;

(b) While the delay in filing the heads of argument was not substantial, the delay in filing the record can only be described as inordinate;

(c) Included in the total period of that delay were a number of periods, of cognizable length, where the failure to take any action was not explained at all. There are also instances where wrong action taken was not explained, viz., the initial request to the wrong court for

the record and tapes of the proceedings in the industrial court and the filing of a record that was not bound, paginated or indexed. As already stated, what has not been explained cannot be condoned.

(d) There is no explanation for the delay in filing the application for condonation. Again, it follows that no condonation thereof can be granted.

[10] The cumulative effect of all the respects in which the applicant failed to comply with the applicable rules, in some instances grossly so, and the failure to explain same, was such that this Court was not called upon even to consider the applicant's prospects of success in the appeal, but was required summarily to refuse the application for condonation together with the costs order referred to earlier.

KROON JA

I agree

FRONEMAN DJP

I agree

CONRADIE JA

Appearance for Appellant: Mr TALJAARD
Instructed by Smith Tabota-Barnes & Ross

Appearance for Respondent: Mr WADE
Instructed by Marshall & Kaplan

Date of Hearing: 11 February 1999

Date of Reasons: 3 March 1999