

**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG**

Case no: JA 84/99

In the matter between:

JAMES WILLIAM HENRY NEWTON

APPLICANT
(Respondent on appeal)

and

WEST PARK SPAR

RESPONDENT
(Appellant on appeal)

JUDGMENT

COMRIE AJA:

1. This application arises from the dismissal of the present applicant from the employ of the present respondent in 1996. An application for a determination in terms of s. 46 (9) of Act 28 of 1956 was set down for trial on 6 January 1999. It appears that on that date the case proceeded in the absence of the respondent and its representative. The presiding officer reserved judgment and on 8 January 1999 made a written determination that the applicant's dismissal constituted an unfair labour practice. The respondent was ordered to pay compensation.
2. The respondent moved for rescission of the foregoing default determination. The application, which was opposed, came before a

member of the Industrial Court, Adv. T. M. Dannhauser. On 26 August 1999 he refused rescission, and made no order as to costs. The respondent appealed to this Court.

3. Various delays occurred in the preparation of the appeal record. Eventually, the only problem which remained was the following. The hearing before Adv. Dannhauser, on 31 May 1999, was recorded; the relevant magnetic tape recording of the proceedings could allegedly not be found; on this basis the parties' attorneys were agreed that Adv. Dannhauser be approached to compile a minute of the notes which he took on that day. Questions were raised about who would fund this exercise and whether it was proper for the respondent's attorney to approach the presiding officer. In the result he was not approached and the appeal has languished.
4. Early in 2002 the present applicant (respondent in the appeal) launched the present notice of motion in which he prayed for an order:

“1. Declaring that the appeal in this matter is deemed to have lapsed.

2. Alternatively the Respondent is ordered to take such steps as may be directed by the above Honourable Court in order to prosecute the appeal within a time period to be prescribed by the above Honourable Court.

3. Further alternatively, requesting the Registrar to set the

appeal down for hearing on the record that is available on the date of this order.

4. Costs of suit.”

The basis for the application is that the respondent (appellant in the appeal) has tarried too long in the prosecution of the appeal and that the applicant wants finality.

5. The application is opposed. Part of the respondent’s case, to be found in the opposing affidavit and in the correspondence, is this: that although no sworn evidence was adduced at the hearing on 31 May 1999, statements from the bar were made in relation to the absence of the respondent and its representative from the trial on 6 January 1999. The respondent believes that these statements from the bar will have a bearing on the outcome of the appeal.
6. There is also before us an application, dated 2 May 2002, for an order in terms of rule 5 (17) of the rules of this Court extending the period within which the appeal record is to be lodged. Technically this application is directed to the Judge President in chambers, but I record that he has no objection to us disposing of it. See too rule 12.
7. The parties do not appear to have heeded the warning implicit in **Department of Justice v Hartzenberg 2002 (1) SA 103 (LAC)**, namely that Adv. Dannhauser’s bench notes for 31 May 1999 may no longer be extant. We put this question to counsel when the matter was

called, but no one had asked him. The matter stood down for enquiry to be made. Adv. Dannhauser's reply, we were informed by counsel, was that any such bench notes had long since been destroyed.

8. According to the judgement in **Xaba v Portnet Ltd (2000) 21 (ILJ) 1739 (LAC)** there is no time limit for the filing of the record in an appeal from the Industrial Court. That does not mean, however, that an appellant, whose duty it is to have the appeal record prepared and lodged, can take as long as he or she likes. On the contrary, reasonable expedition is to be expected. The fact of the matter is that, save in respect of 31 May 1999, the record of the appeal is complete and can be lodged and the appeal can be heard. With regard to 31 May that deficiency, if such it be, cannot be cured.
9. Labour Appeal Court rule 5 (12) (h) provides that the record of oral argument shall be omitted from the appeal record unless such argument affects the merits of the appeal. We are not able to determine on the limited papers before us what bearing, if any, the oral argument may have on the outcome of the appeal. That is a matter for this Court to decide when it hears the appeal. I may perhaps point out that Hartzenberg's case, supra, is distinguishable because in that case most of the sworn evidence was irretrievably lost. Nonetheless we know, from his supplementary heads of argument, that Mr Le Roux, for the respondent/appellant, will seek to persuade the Court that the statements from the bar were "in the nature of testimony". I express no view on that proposition.
10. Counsel were in agreement, in Mr. Le Roux's case reluctantly, that the

proper order to be made in the circumstances which have emerged, would be an order in terms of prayer 3 of the notice of motion, namely directing the Registrar to set down the appeal for hearing on so much of the record as is presently available. Implicit in this is that no order would be required in respect of the respondent's application in terms of rule 5 (17). I think, however, that as a precaution the respondent should be directed to file the appeal record by a fixed date, failing which the appeal will be deemed to have lapsed.

11. I turn to the costs of the two applications which are before us. While it was a reasonable step for the applicant to bring this matter to a head by way of the notice of motion, nothing precluded his advisers from putting the obvious question to Adv. Dannhauser. A timeous enquiry and answer should have enabled the applicant to force the respondent's hand, should have avoided the need for an application, and should have enabled the appeal to be heard by now. For this reason I am not inclined to award the applicant its costs. On the other hand the duty to prepare and lodge the record rested on the respondent as appellant, and this included the duty adequately to confront such difficulties as presented themselves. It too failed. I am accordingly not in favour of ordering that the costs under review should be costs in the appeal. If the respondent wins the appeal, such an order would mean that the applicant would have to pay the costs now under consideration, which would not be fair. It seems to me therefore that the proper order is to make no order as to costs.
12. I propose an order in the following terms:

1. The respondent is ordered to lodge the record of the appeal (without a transcript or other note in respect of 31 May 1999) with the Registrar of this Court by not later than 31 May 2002, failing which the appeal will be deemed to have lapsed;
2. Upon timeous receipt of the foregoing record of appeal, the Registrar is directed to set the appeal down for hearing;
3. No order is made on the respondent's application for an extension of time dated 2 May 2002;
4. No order for costs is made in respect of either the applicant's notice of motion or the respondent's application for an extension of time.

R.G. Comrie
Acting Judge of Appeal

I agree.

C.R. Nicholson
Judge of Appeal

I agree.

M.T.R. Mogoeng
Judge of Appeal

Appearance:

For the Applicant: Adv. C. Bredenkamp

Instructed by: Roux Inc, Pretoria

Respondent: Adv. M Le Roux

Instructed by: Kobus Cronje Attorneys, Pretoria

Date of Hearing: 7 May 2002

Date of Judgement: 20 December 2002