

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

Case no: JA37/04

IN THE MATTER BETWEEN:

ZULU, LAWRENCE BEKUMIZI

Appellant

AND

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First respondent

MUDAU, A.R.N.O

Second respondent

ABSA PROPERTIES

Third respondent

Judgment

TLALETSI AJA

Introduction

- [1] This appeal is against the judgment and order of the Labour Court in a review application that had been brought by the appellant to that court to have a certain decision made by the second respondent, varying the award issued by him, reviewed and set aside. The Labour Court, per **Waglay J**, as he was then, dismissed the appellant's application for review and ordered that the appellant should pay the costs of the application. The appellant unsuccessfully applied for leave to appeal in the Labour Court. He petitioned the Judge President of this Court for leave to appeal and this Court subsequently granted the appellant leave to appeal to this Court against the order of the Labour Court.

Factual Background

- [2] The respondent is a division of ABSA Bank Limited, ("the employer") a company duly registered in terms of the Company laws of the Republic of South Africa. The appellant was employed by the employer since 1994 as an "air-conditioning assistant". He was dismissed on allegations of misconduct. The date of dismissal has not been provided. Being aggrieved by his dismissal, he referred an unfair dismissal dispute to the first respondent, the Commission for Conciliation, Mediation and Arbitration ("the CCMA") alleging that his dismissal was unfair. Naturally, the employer contended that the dismissal was fair. The dispute was arbitrated by the second respondent on 10 February 2000. On 30 March 2000 the second respondent issued an award in which he found that the dismissal was indeed unfair and ruled that the appellant be reinstated with immediate effect. The arbitrator directed further that the appellant be paid an equivalent of twelve (12) months' salary, being an amount of R32 340-00 within fourteen days as compensation.
- [3] The employer thereafter applied to the CCMA for the variation of the award. The second respondent, who was a commissioner of the CCMA issued an award on 12 April 2000. In the award he recorded that:
- "1. After listening to the employer's submission on the matter. I wish to vary my award dated 30 March 2000 as follows:
- 1.1 The respondent is ordered to pay compensation as follows:
- Compensation equivalent to 12 months at the rate of R2929-89 which equals R35158-68.
- 1.2 The amount of R35158-68 must be paid within 14 days of this award."

For the sake of convenience, I shall henceforth refer to this award as "the second award" and the award issued on 30 March 2000 as "the original award."

- [4] In compliance with the award, the employer issued two cheques payable to the appellant dated 17th and 18th April 2000 for R20392-04 and R12, 225-56 respectively. It is common cause that these cheques were accepted and deposited by the appellant into his bank account and were honoured.
- [5] On 15 May 2000 the appellant's legal representatives launched an application in terms of section 158 (1) (c) of the ***Labour Relations Act 66 of 1995*** ("the Act") for an order making the original award dated 30 March 2000 made an order of Court. On 18 May 2000 the appellant served a document entitled "*Affidavit In Support Of Proof Of Service Of Arbitration Award*" on the employer. In the document the appellant stated that the award was served by hand on or about 30 March 2000 and that the third respondent had failed to comply with the part of the original award relating to his re-instatement. He was requesting that the 'agreement' be made an order of court. It is not clear which 'agreement' is being referred to. One can only assume that he was referring to the original award as it was the only document which was served and no agreement had ever been entered into according to the record.
- [6] On 23 May 2000 the employer's attorneys addressed a letter to the appellant's attorneys advising that the award the respondent was seeking to enforce was varied on 12 April 2000 and that a new award had been issued. Although the employer referred to the letter as annexure 'E' in the affidavit in support of the application for rescission of judgment, a copy of such a letter is not part of the appeal record. On 24 May 2000 the employer's attorneys served and filed a notice of

intention to oppose the application to have the award made an order of court.

- [7] On 02 June 2000 during a telephonic discussion, the employer's attorneys were advised by the appellant's attorney that he was going to withdraw the application to have the award made an order of court and that he would serve such notice of withdrawal soon. On 05 June 2000 the employer's attorneys forwarded a letter to the appellant's attorney confirming the telephone discussion of 02 June 2000 and further advised that they had not yet received the notice of withdrawal. They further mentioned that, should they not receive the notice of withdrawal by close of business on 06 June 2000, the employer would file its answering affidavit. The notice of the withdrawal of the application was subsequently served on 06 June 2000. On 7 June the employer's attorneys addressed a letter to the applicant's attorney confirming receipt of the notice of withdrawal.
- [8] Despite the notice of withdrawal, the appellant served, by telefax, a notice of setdown of the application to have the award made an order of court on 5 July 2000 on the employer. In accordance with the notice, the setdown was for 4 July 2000, on the unopposed motion court roll. In addition, the notice of setdown was accompanied by an order by **Revelas J**, making the original arbitration award an order of court. The order was dated 04 July 2000 which was the day preceding the one on which it was faxed.
- [9] On 20 July 2000 the employer served and filed an application for rescission of the order by **Revelas J**. In the application, the employer contended that it had no knowledge of the application to have the award made an order of court and also that the original award had been rescinded already. The appellant opposed the application for rescission and contended, *inter alia*, that he did not instruct his

erstwhile attorneys of record to withdraw his application and that he was not aware of the variation of the original award. He also mentioned that he was not served with the application to vary the award. On 17 November 2000 **Revelas J** issued an order rescinding the order she had made on 04 July 2000 and ordered the appellant to pay the employer's costs of the application for rescission.

[10] On or about 06 December 2000 the appellant filed an application in terms whereof he was seeking an order reviewing and setting aside or correcting the second award. This application also encompassed an application for condonation for its late filing. In the review application the appellant contended that neither he nor his attorneys of record had been notified of the application for variation and that the commissioner had committed a gross irregularity by proceeding with the variation proceedings in his absence and without ascertaining whether the employer had served the notice of that application on the appellant, either on himself or on his legal representatives.

[11] On or about 09 January 2001 the employer served and filed an affidavit in opposition to the application for review. In the opposing affidavit the deponent, *Boikanyo George Prince*, who was employed by the employer as an Industrial Relations Consultant, contended, *inter alia*, that one *Johan Van der Merwe* as well as *Tshepo Nathan*, both from ABSA, did advise the appellant of the application to amend the original award, and that the appellant also attended the proceedings before the commissioner on 12 April 2000 at the CCMA offices in Johannesburg. He also stated that the appellant, he continued, reported at the office of *Johan Van der Merwe* on that day and that the two, as well as the deponent travelled in the same vehicle to the CCMA offices. He mentioned further that the appellant personally appeared before the commissioner to oppose the variation application and that at some stage he walked out of the proceedings. The commissioner,

he continued, followed him and apparently persuaded him to rejoin the proceedings and the proceedings were thereafter concluded in his presence.

[12] In the replying affidavit the appellant denied that the persons mentioned (*Van der Merwe and Nathan*) notified him or discussed any application for variation with him. He stated that the third respondent had offered no explanation why the application had not been served on him or his legal representatives. He further denied that he had travelled with the people mentioned and he challenged the employer to file an "attendance register" as well as a copy of the record of the alleged proceedings before the second respondent as proof. Finally, on this aspect he mentioned that there was nowhere in the record where the commissioner stated that the appellant had attended the hearing or that he had persuaded him to rejoin the proceedings.

[13] On 15 January 2001 the CCMA filed a record of the proceedings in compliance with Rule 7A (2) (b) and 7(9) of the rules of conduct of the proceedings in the Labour Court. The notice advised, *inter alia*, that the CCMA stood by the reasons for the decision as furnished in the second award. The record that was being filed consisted of one cassette tape, a referral for Conciliation document, a referral for Arbitration form and the original Arbitration award dated 30 March 2000.

[14] On 2 December 2002 the appellant's attorney served and filed an application in which he sought to "set aside" the notice filed by the CCMA in terms of Rule 7A(2)b and 7(9). In the supporting affidavit the appellant alleged that the rescission ruling in case GA63569 referred to in the notice did not relate to the matter between the parties but to different parties. On 4 March 2003 **Pillay J** issued an order in terms whereof paragraph 4 of the notice filed by the CCMA relating to the

rescission ruling in GA63569 was struck off with no order as to costs. This order had the effect of deleting the statement that the commissioner stood by the reasons for his decision as furnished in the "Rescission Ruling GA 63569" dated 12 April 2000.

- [15] On 9 June 2003 the appellant filed a notice in terms of Rule 7A8(b) of the rules of the Labour Court indicating that he stood by his Notice of Motion and that, if the respondents intended opposing the application, they should do so within ten (10) days of receipt of the application failing which the matter would proceed as unopposed. The application for review was set down on the unopposed roll for the 13th August 2003. On that day Trengove AJ issued an order in terms of which the commissioner's second award was reviewed and set aside and the original arbitration award issued on 30 March would still stand. This meant that the position as it obtained after the original award was reinstated.
- [16] On 21 August 2003 the employer brought an application for the rescission of the order issued by **Trengove AJ**. In the founding affidavit the employer contended that the appellant and his attorneys were at all times aware that the application for review was opposed and that the opposing papers had already been filed on 21 January 2004. **Van Niekerk AJ** granted an order for the rescission of the order granted by default by **Trengove AJ** on 13 August 2003 and made no order as to costs. This now meant that the review application brought by the appellant was now pending once again and that the original award remained rescinded by the second award.
- [17] The review application was set down for hearing in the opposed roll for the 7th May 2004. The appellant appeared in person to present his application and the employer was represented by counsel. The application was heard by **Waglay J**. The application was dismissed

with costs. It is against this decision that the appellant appeals to this Court.

- [18] In the review application the appellant contended that the variation award was reviewable in that he was neither notified nor did he have knowledge of the employer's intention to vary the award. He also contended that he had not been made aware that the commissioner was to hear the application. The Labour Court held that against appellant's allegations there were affidavits filed by the employer to the effect that not only was the appellant notified of the hearing of the variation of the initial arbitration award but that the appellant was also present and indeed opposed the variation application and that at some stage walked out of the hearing. Adopting the approach laid down in **Plascon- Evans Paints Ltd v Van Riebeck Paints (Pty) Ltd 1984 (3) SA 623 (A)** at 634E-635C with regard to motion proceedings, the Labour Court held that, having considered the affidavits and the balance of probabilities, the appellant was in fact present when the variation matter was heard and that the appellant was given an opportunity to file a transcript of the hearing. It would, however, appear that the proceedings were not recorded. The Labour Court also remarked that the appellant insisted on proceeding with the hearing of the review application despite the Labour Court's warning that, as the papers stood, his prospects of success were not favourable. The Labour Court found, based on the papers as they were, in favour of the employer and ordered that costs should follow the result.

The Appeal

- [19] It is perhaps opportune to mention some procedural issues that have been raised by the employer which relate to the way the appellant has conducted this appeal. The effect of these procedural difficulties, if

valid, would be that no appeal has not been noted, alternatively, if noted, it has lapsed.

19.1 Appellant was granted leave to appeal on 04 February 2005 after petitioning the Judge President of this Court. In terms of rule 5(1) of the rules of this Court the appellant's Notice of Appeal had to be delivered within 15 days from 04 February 2005. On 23 March 2006 the appellant served a Notice of Motion in which he stated that he was "applying for the appeal" to set aside the commissioner's variation award dated 12 April 2004 with costs. He also stated in the document that the "application for appeal" was against the whole of the judgement granted by **Waglay J**. The notice was accompanied by an affidavit deposed to by the appellant. In the supporting affidavit the appellant set out the grounds why he wanted the judgment to be set aside. By way of background he set out why the commissioner was wrong to vary the award in his absence and without his knowledge which he stated was "contrary to the Act". He also stated that **Waglay J** made a ruling on false statements and without proof from the commissioner and the employer that he had attended the hearing of the application for the variation of the original award. Put otherwise, the appellant was challenging the factual finding of the Labour Court that he had attended the variation application hearing.

19.2 It was contended on behalf of the employer that the appellant's Notice of Motion filed on 23 March 2006 does not constitute a notice of appeal, and that to the extent that it may be said that the document constitutes a notice of appeal, then it was delivered more than a year late and was noted by an accompanied application for the condonation of the late delivery of such "notice of appeal". The employer contended, therefore, that if the documents that the appellant file did not constitute an appeal, then there is no appeal before this Court, but that, even if those documents can be said to constitute a notice, the

notice of appeal would have been filed way out of time and in the absence of a condonation application, the appeal falls to be dismissed.

19.3 The second point raised on behalf of employer is that the appellant has failed to comply with rule 5(8) read with rule 4(9) of the rules of this Court in that he failed to file the record of the appeal within 60 days from the date of the granting of leave to appeal and only did so on 23 March 2006 which is way out of time. It was contended that the as there was no application either for the extension of time in terms of rule 5(17) or for condonation of the delay in terms of rule 12 (1), the appellant is in terms of rule 5(17) deemed to have withdrawn the appeal.

19.4 The third point raised on behalf of the employer is that the appellant has failed to comply with rule 5(10) of the rules in that the record is not numbered on every tenth line and was also incomplete. By contrast, goes the argument, the documents that ought to be excluded in terms of rule 5(12) have been included. An example of such documents included was a set of heads of argument in the first rescission application. A point was also taken, without further elaboration, that the appellant had not provided the security requested by the respondent. Such a request is not part of the record and it had not been disclosed when and how it was made. This last point does not deserve any consideration by the Court.

[20] On 15 November 2006 the appellant filed an affidavit with annexures which bear the heading "The Appellant's Answering Affidavit to the Third Respondent's Heads of Argument." In the affidavit the appellant stated that he was never served with the employer's heads of argument and that he only noticed at the Labour Court that the heads were filed on 20 September 2006. He mentioned that he had not been in wilful default in 'respect' of the proceedings instituted against the

employer and that he applied for (condonation) to the Judge President for the matter to proceed to the Labour Appeal Court. He stated that the Registrar of the Labour Court refused him the opportunity to file his appeal because he had no legal representative.

- [21] The annexures to his affidavit consisted of the letter to the Judge President in which he requested that the matter should be proceeded with despite the fact that he did not have an advocate as he was unemployed. The date appearing next to his signature is 27 January 2006, which is eleven months after the date of the order granting appellant leave to appeal.
- [22] The second annexure is an affidavit in the letterhead of the Johannesburg Justice Centre in which the appellant stated that his application for legal aid had been turned down and that his written representations setting the grounds of his appeal should be "handed" to the Legal Aid Officer. This letter, which is dated 22 November 2005, was also a complaint against the Johannesburg Justice Centre for turning down his application for legal aid and was making a request to the Legal Aid Board to make a representative available for his case pending in this court. The last annexure which is dated 22 November 2005 is a letter to the Judge President once again requesting that his matter be proceeded with despite him having no legal representative as he would not obtain assistance from the institutions already referred to above. He further sets out the historical background of his case and why he believed that his appeal should be successful.
- [23] The procedure for prosecuting appeals to this court is prescribed by Rule 5 of the 'Rules Regulating the Conduct of the Proceedings of the Labour Appeal Court.' It is necessary to quote the relevant provisions of the rules relating to the objections raised on behalf of the employer.

Rule 5(1) provides that:

"Every appellant who has a right of appeal must deliver a notice of appeal within 15 days, or any longer period that may be allowed by the Court, on good cause shown, after leave to appeal."

Rule 5 (7) and (8) relating to the record reads:

"(7) After an appeal has been noted, the appellant must serve a copy of the record of the proceedings in the Labour Court on each respondent and file four copies of the record with the registrar.

(8) The record must be delivered within 60 days of the date of the order granting leave to appeal, unless the appeal is noted after a successful petition for leave to appeal, in which case the record must be delivered within the period fixed by the Court under rule 4(9)".

(9) One of the copies of the record filed with the registrar must be certified as correct by the registrar of the Labour Court.

(10) Every copy of the record must-

(a) be clearly typed or printed in double spacing on A4 standard;

(b) be paginated;

(c) be numbered on every tenth line;

(d) be securely bound in suitable covers disclosing names of the parties and the names of the representatives of the parties;

(e) be divided into separate, conveniently-sized volumes of approximately 100 pages each; provided that a volume may consist of a lesser number of pages if it is convenient that such

volume consist in a self-contained separate portion of the record;

(f) include the judgment given by the Labour Court;

(g) contain a correct and complete index of the evidence and of all the documents and exhibits in the case, the date and nature of the exhibits being briefly stated in the index;

(h) contain only those documents that were referred to in any proceedings in the Labour Court;”

[24] I now proceed to consider the points raised by the respondent referred to above. It is not in dispute that the appellant obtained leave from this court to appeal against the judgment and order from the Labour Court on 4 February 2005. He was, therefore, in terms of Rule 5(1) obliged to serve and file a notice of appeal within 15 days from the date on which he was granted leave to appeal. It is common cause that the appellant did not comply with Rule 5(1) as required. In his favour, I am prepared to treat the notice of motion incorporating an “application for appeal” together with its supporting affidavit as serving the purpose of a notice of appeal, bearing in mind that he was not legally represented and that he seems to have drawn the papers himself. Although the document does not conform to a notice of appeal, it has some parts that have the necessary information to serve as a notice of appeal. However, these documents were only served on the respondent on 23 March 2006, almost a year after leave to appeal had been granted.

[25] By 23rd March 2006 the respondent would have been justified to have concluded that the appeal had been abandoned. There is no indication to suggest that during this period the appellant communicated with the

respondent to indicate that he was still interested in proceeding with the appeal. Having failed to file the notice of appeal within 15 days of the order granting leave, the appellant ought to have filed an application for condonation of the late filing of his "notice of appeal" together with his papers filed on 23 March 2006. For the application to succeed the appellant had to show good cause for him to be allowed a longer period than 15 days as required Rule 5(1). Instead of filing an application for condonation, the appellant has decided to respond to the respondent's heads of argument in which the objections referred to above have been raised and attached copies of his correspondence with the Johannesburg Justice Centre. This action falls short of an application for condonation before this court. The requirements necessary for this court to come to the assistance of the appellant have not been satisfied. The appellant's failure to file his notice of appeal on time and his failure to file an application for the condonation of his such failure has the consequence that his appeal should be dismissed.

[26] The next objection relates to the appellant's failure to file a record within 60 days from the date of the order granting leave to appeal as well as failure to comply with rule 5(9). The record was only filed on 23 March 2006 which makes it to be out of time by at least 10 months.

[27] If the appellant had realised that he would not be able to file the record in time, he was required to follow the procedure provided in rule 5(7). He could approach the respondent for an extension of time and, if the respondent refused him an extension he was expected to approach the Judge President in chambers on notice of motion supported by an affidavit served on the other side, for an extension of time. He failed to do any of this. His failure to do this meant that he was deemed to have withdrawn his appeal. This is in terms of the rules of this Court. In this instance nothing indicate that the appellant was not aware that

he had to file the record within 60 days of the order granting leave to appeal. He was notified specifically in the order granting leave to file the record within 60 days. The other option available to the appellant after he had failed to file the record within 60 days was to apply to this court for the condonation of his failure to comply with the rules of this Court. See also **Peach & Hatton Heritage (Pty) Ltd v Neethling & Others** [2001] 5 BLLR 528 (LAC) at 529I-530I; **Goldfields Trust (Pty) Ltd & Another v Stander & Others** [2002] 9 BLLR 797 (LAC) at 798D-799H. Once again the appellant has not filed an affidavit to explain his failure to comply with the order of the court as well as Rule 4(9) of the rules of this Court. No attempt was made to approach the respondent for an extension of time to file the record. In the absence of a successful application for the condonation of the late filing of the record, the appellant is deemed to have withdrawn the appeal.

[28] The other objections relate to the state of the record. As the objection goes, the record is not numbered on every tenth line and unnecessary documents have been included. Of importance is also the fact that the record is incomplete. Annexures to the founding affidavit to the application for review are not part of the record. It is not known whether these annexures would in any way help to advance either party's case on appeal.

[29] The most important record for the present appeal is the record relating to the proceedings of 12 April 2000 in which the award issued on 30 March 2000 was varied. This record was not available at the review application before the Labour Court. In fairness to the appellant, he did file a notice requesting the CCMA to file that record. In compliance with the appellant's request, the CCMA did file a record consisting of documents in the CCMA file. However, the relevant record was not filed. As pointed out earlier, the CCMA also referred to a matter which

was not related to the parties before it. The appellant successfully applied in the Labour Court for an order to strike that paragraph out.

[30] In the light of the appellant's failure to comply with the rules of this Court, in particular his delay of over a year to file his "Notice of appeal" and his delay of about ten months in filing the record of appeal and his failure to bring a condonation application, he is deemed in terms of the rules of this Court to have withdrawn his appeal. In the result there would be no basis to reverse the effect of this court's rules. The matter must be struck off the roll. I propose not to make an order for costs.

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

1. The appeal is struck off the roll.
2. There is to be no order as to costs.

Tlaletsi AJA

I agree.

Zondo JP

I agree.

Hendricks AJA

Appearances

For the Appellant: In person

For the Respondent: Mr Le Grange

Instructed by: Hofmeyr Herbststein Gihwala INC

Date of Judgment: 11 December 2007