

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

CASE NO: J3696/99

In the matter between:

1st Applicant

2nd Applicant

3rd Applicant

4th Applicant

5th Applicant

6th Applicant

7th Applicant

and

1st Respondent

2nd Respondent

4th Respondent

JUDGMENT

PILLAY A.J.:

1. On 24 August 2000 I dismissed an application for condonation with costs. Herewith my reasons therefor.
2. Application for condonation of the delay in instituting review proceedings was considered *in limine*.
3. The application for review was brought in terms of section 158(1)(h) of the Labour Relations Act 66 of 1995.

4.The relief claimed was stated as follows:

- “1 The reviewing and setting aside of the proceedings of the Disciplinary inquiry into the alleged misconduct of the Applicants held by the Second Respondent, on the basis that the whole process starting from the charge being preferred against the Applicants smacks of discrimination in contravention of Schedule 7 Part B Item 2(1)(a).
- 2 Reviewing the decision of the First Respondent dismissing the Applicant from employment with the Northern Province Department of Health and Welfare and setting aside Notice to the Applicant dated 4th June 1997 to this effect.
- 3 Ordering the First Respondent to reinstate the Applicants in their service or employment with the Northern Province Department of Health and Welfare with effect as from 01/07/1997.
- 4 Directing the Second Respondent and the Third Respondent to take the necessary steps forthwith to reinstate the Applicants’ salaries or emoluments and to pay all the outstanding benefits due to the Applicants arising from their individual contracts of employment with effect from 1st July 1997.
- 5 Ordering the Second and/or Third Respondent to pay interest on the amount found to be due to the Applicants as per prayer 4 above and same to be calculated at the rate of 15.5% per annum a *tempore morae*. (From 1st July 1997).
- 6 Ordering the First Respondent to pay the costs of this application and the Second Respondent be ordered to pay the costs of this application only in the event of his opposition to this application.”

5.The applicants were employed by the Department of Health and Welfare, Northern Province at Jane Furse Hospital.

6. They were dismissed following a disciplinary enquiry which commenced on 18 November 1996 and concluded on 20 January 1997. They were notified on 4 June 1997 of their dismissal which took effect from 1 July 1997. Their appeal to the Provincial Service Commission was dismissed about August 1997. The applicants allege that they were dismissed in October 1997 when they were informed that their appeal was unsuccessful.

7. The Provincial Service Commission is not a party to these proceedings. Its decision to dismiss the appeal against their dismissal is not the subject of the review.
8. The applicants were charged in terms of the Public Service Act No 103 of 1994 for inciting co-workers to embark on illegal strikes, swearing at and threatening the superintendent and later, for insubordination by breaking a condition of their suspension by entering the hospital premises.
9. An application for a conciliation board was made to the head of the department on 11 March 1998, five months after they became aware that their appeal against their dismissal was unsuccessful.
10. The dispute was referred on 16 April 1998 as an unfair dismissal to the CCMA for arbitration. The commissioner concluded on 5 November 1998 that the CCMA lacked jurisdiction to arbitrate the dispute because it had been referred after the expiry of the 180 days prescribed in section 18 of the Public Service Labour Relations Act 105 of 1994 (“the Act”). The commissioner directed the applicants to apply for condonation.
11. In terms of section 18(11) of the Act, such an application had to be brought within 180 days from the date on which the applicants were notified of the reasons for the dispute. The judgment of the fourth respondent which incorporates his summary of the evidence and reasons for his decision was furnished to the applicants’ former attorneys on 19 May 1997. But for the application in terms of rule 7A(4), which was made in January 2000, it is not evident that any other request for further and better reasons for the dismissal was requested.
12. Ten months later on 20 September 1999, the applicants launched this application for review on the grounds *inter alia* of discrimination.
13. The review application was prefaced with an application for condonation as it was brought out of time.
14. Counsel for the first to third respondents submitted that as the applicants had failed to comply with the provisions of section 39 of the Public Service Act 103 of 1994 (“the Public Service Act”) the review was out of time. Section 39 of the Public Service Act provides:

“(1) No legal proceedings shall be instituted against the State or any body or person in respect of any alleged act in terms of this Act, or any alleged omission to do anything which in terms of this Act should have been done,

unless the legal proceedings are instituted before the expiry of a period of 12 calendar months after the date upon which the claimant had knowledge, or after the date on which the claimant might reasonably have been expected to have knowledge, of the alleged act or omission, whichever is the earlier date.”

15. The applicants were aware of their dismissal before August 1997. The review was filed on 20 September 1999, almost three years later. Clearly the review is outside the time limits prescribed in section 39.
16. The Court has a discretion to dispense with the requirements or prohibitions of section 39(1) of the Public Service Act if the interests of justice so require. (Section 39(3) of the Public Service Act). Section 158(1)(h) also requires that such reviews be brought within a reasonable time. As section 158(1)(h) prescribes no time limits, the Court may determine what a reasonable period is in all the circumstances. (Setsokeane Busdiens v Nasionale Vervoerkommissie 1986 (2) SA 57 (A).)
17. Before exercising such a discretion and dealing with the substance of the application for condonation, something needs to be said about the form in which it was made. The applicants’ principle stance was that the review application was brought within a reasonable time. Such application as there was for condonation was made in replying affidavits in an interlocutory application. This is an abuse of process. The applicants ought to have been keenly aware of the time limits once the arbitration was dismissed. They in fact indicated in their Reply that they were aware of the Public Service Act at the conclusion of the arbitration. Despite this, no application for condonation was made out in their founding affidavits. (*Marburg v Marburg* 1948(3) SA 731 and *Shakot Investment v Town Council, Borough of Stranger* 1976(2) SA 701.)
18. This Court inclines towards dealing with disputes substantively. However, if non-compliance with form impedes the Court or the respondent in dealing with the substance, then the applicant will have to bear the consequences. The consequence is that the Court may disregard any new material raised in reply.
19. This case is distinguishable from others where the applicant may not have been aware of the need for condonation when the review was launched. The Court has allowed parties to make condonation applications subsequent to the launching of review proceedings. However, the applicants are not deserving of any such indulgence in this case as there is no explanation whatsoever as to why they did not make out their case for condonation in their founding papers.

20. The application for condonation should be dismissed. However such an approach may be unduly harsh and technical in a situation where seven applicants claim that they were unfairly dismissed. I therefore consider the substance of the application for condonation.
21. In determining what a reasonable period would be, regard should be had to Radebe v Government of the Republic of South Africa & Others 1995 (3) SA 787. The applicants have not adequately explained the delay between the periods October 1997 when they were advised of the outcome of the appeal and 11 March 1998 when they applied for the establishment of a conciliation board (the first period), and the period between 5 November 1998 when the CCMA dismissed the arbitration for want of a condonation application and 13 September 1999 (the second period).
22. Consideration of the delay in the first period is not *res judicata*. The arbitrator had ruled that she had no jurisdiction because a condonation application had to be made and considered first. This court is therefore free to consider the explanation for the delay in the first period in order to determine whether the delay in bringing this application should be condoned. The explanation for the delay in the first period was that two applications for the establishment of a conciliation board were made because there was no response to the first application.
23. In terms of section 18(10)(a) of the Act which operated as a collective agreement in terms of item 15 of Part D of Schedule 7 of the LRA, a dispute may be referred to arbitration if the head of the department fails to establish a conciliation board within 10 days of receiving the conciliation board application form.
24. There was therefore no reason for two applications for a conciliation board.
25. With regard to the second period, the applicants' explanation was that their attorney had difficulty contacting them. Furthermore, they lacked the financial resources to pursue the matter.
26. The failure of the applicants to maintain contact with their attorney is an indication, though inconclusive, that the applicants no longer had any interest in the matter.
27. If they had been in financial difficulties the applicants did not explain why they did not approach the Legal Aid Board, or when and how their difficulties were overcome in order to bring the application eventually. A bald allegation of a lack of resources is wholly inadequate in an application for condonation.

28. The respondents were given no indication during the second period of the applicants' intention to bring the review application.
29. The applicants have not made out a case as to why any of the criteria considered in Radebe v The Government of South Africa and others should be applied in their favour.
30. In the circumstances the Court finds that the review application was not brought within a reasonable period. A delay of 3 years is comparable to a delay of 4 years which, the Court in NUMSA & others v Transmissions & Steerings (Pty) Ltd 1999 12 BLLR 1237 (LAC), refused to condone as the delay precluded a fair hearing. On the basis of this decision alone the Court may refuse to grant any indulgence either by way of a condonation or a dispensation in terms of section 39(3) of the PSA. However, as the matter is important to the applicants the Court will continue to consider the substance of the application for condonation further.
31. Mere delay is not usually sufficient to refuse an application for condonation. There must also be prejudice to the respondents. The first to third respondents are likely to suffer severe prejudice. Firstly, only portions of the transcripts of the record of the proceedings under review are available. The grounds of review are such that there appears to be substantial disputes of fact as to what transpired at the disciplinary enquiry. In the absence of agreement between the parties about the record, the court would be reluctant to resolve such disputes of fact by reference to only portions of the record. It may in fact not be able to do so.
32. Furthermore, the applicants sought to set aside the proceedings of the disciplinary enquiry on the ground that it "smacks of discrimination". In the absence of an agreement about the record of the disciplinary enquiry, the Court will not know what transpired at the disciplinary hearing in order to decide whether the proceedings were conducted in a discriminatory manner.
33. The Court will not be able to make a proper finding based only on the employers evidence and the evidence in chief of the third applicant. It was submitted that the record of the respondent's case was intact and as the respondent bore the onus of proving the fairness of the dismissal, the portion of the record available was sufficient to determine the matter on review. If the submission is accepted then the Court will be determining the review on the evidence at the enquiry of substantially one party only, ie the respondent. Furthermore, the Court will be deprived of the opportunity of evaluating the applicants' defence as presented at the disciplinary enquiry. The

record of their cross examination could also be as important to the respondent's case as the evidence of the respondent's own witnesses.

34. The respondent alleged - and this was not disputed by the applicants - that some of the persons who were involved in the matter were no longer available to the respondents. The lapse of time also creates difficulty for witnesses to recall the events.
35. The respondents contended that they could not proceed with the review with only a portion of the record as the applicants alleged that certain evidence was tendered in the proceedings by some of the applicants, which was disputed by the respondents. The respondents also alleged that certain issues were not tested under cross examination of its witnesses. In the absence of a full transcript of all the evidence of both the applicants' and respondents' witnesses the Court will not be in a position to resolve these disputes of facts. Apart from the prejudice to the respondents, the absence of a full transcript of the proceedings impedes the Court in making proper findings.
36. The applicants contended that it would have made no difference if the application was brought in time as the portions of the record had been lost a long time ago. The court accepts that a respondent should not be allowed to "sabotage" a review by disposing of a portion of the record. However, the absence of a full record is being considered in the context of a delay by the applicants and whether the respondents would be prejudiced. Whether the portions of the record were disposed of deliberately or otherwise is not a consideration at these proceedings. The fact is that portions of the record are not available. They might have been available if the applicants had signaled their intention to institute these proceedings timeously.
37. The respondent is prejudiced by the delay not only because the full record is not available but also because the positions of the applicants have such been filled. As they claim reinstatement, their back pay for almost four years would be considerable. It is noted that the applicants did not apply for condonation of the first period as directed by the arbitrator and attempt to return to arbitration for determination of the dispute as an unfair dismissal. If it did so its claim would have been limited to a maximum of 24 months pay. Arbitration would have been a less costly procedure for both parties. It would be grossly unfair now to saddle the respondents with the extra costs.
38. In the circumstances the application for condonation was refused with costs.

Dated at Durban 3 October 2000.

PILLAY AJ

ADV L NOWSENETZ

MAHLASE NONYANE MAHLASE

M M OOSTHUIZEN

STATE ATTORNEY