

IN THE LABOUR COURT OF SOUTH AFRICA
Case no: J3854/00

REPORT AB

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In the matter between:

Applicant

and

First Respondent

DIRECTOR: INDEPENDENT

Second Respondent

Third Respondent

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JUDGEMENT

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NTSEBEZA AJ

INTRODUCTION

[1] On the 18th July 2000, the Applicant (hereinafter referred to as “**the employee**”) filed an application in terms of S 145 (2) (a) (i), (ii) and (iii) of the Labour Relations Act 66 of 1995 as amended (“**the Act**”) alternatively S158 thereof.

He sought an order to review and set aside an award made by the first respondent (hereinafter referred to as “**the arbitrator**”)-- erroneously referred to as award made by the Second Respondent in the applicant’s notice of motion—. The arbitrator had been acting

under the auspices of the Second Respondent, (hereinafter referred to as IMSSA) in a matter between the employee and the Third Respondent, (hereinafter referred to as **“the employer”**). The employee alleged that this dismissal was both procedurally and substantively unfair, in that the arbitrator erred in upholding the employee’s dismissal by the employer, and that he was consequently entitled to reinstatement. It was common cause that the employee had been dismissed on the 17 November 1999. The arbitrators’ award was handed down on 3 April 2000.

- [2] According to the employee, he received the award on the 8th May 2000. Even though the Court date stamp shows that this Court received the review application papers on the 18th July 2000, there seems to be an acceptance by the employer that the employee’s application for review (consisting of the notice of motion and founding affidavit) was served on it on 4 July 2000. The employer contends that the review application was filed out of time and in contravention of S145 of the Act, which requires an applicant to bring a review application within six weeks, calculated from the date on which he/she was served with the award (or the award became known to him/her).

The employer’s contention is therefore that the service and filing of the application was 14 days out of time.

- [3] The employer further contends that in the circumstances, the review application ought to have been accompanied by an application for condonation for the late filing thereof. Where, as here was the case,

the application for condonation was made on 7th February 2002, virtually two years after the review application had been filed out of time by 14 days, the application for condonation had not been made within a reasonable time, contended the employer.

[4] This matter now comes before me to determine two questions, namely, whether I can condone the late filing, by employee, of his review application or whether I should, in refusing condonation, if I am that way inclined, strike the application to review off the roll with costs and set aside the arbitrator's award. The second question is whether the arbitrator's decision to uphold the employee's dismissal is reviewable and must be set aside, with costs.

[5] It seems to me that the condonation application, if it succeeds, will be dispositive of the matter, and I would not therefore have to deal with the arguments on the “**merits**”, so to speak. The matter was not, however, strongly argued on that basis by the parties. As it was, the best part of argument was spent on the substantive issues and only a fraction of the time was devoted to the condonation application. I will, however, in this judgement reverse the order and deal with the condonation application first. Before I do so, the judgement, I think, would benefit from a summary of the facts by way of a background to the dispute.

BACKGROUND FACTS

[6] The employee is a convicted thief, having been accused and

convicted of theft relating to a sum of R300, 00 in or about 1993. He alleges that an appeal against his conviction is pending and accordingly sub iudice. I pause here to observe that his appeal has been pending for a long time.

In January 1997 the employee applied to become a deputy Principal of the Meyerton Primary School. On 16 October 1997 he applied for the post of principal of the same school. It appears that on both occasions the employee attached *a curriculum vitae* in which he stated that he had no previous criminal conviction. One De Beer, member of the School Governing Body (SGB), who apparently knew of the employee's previous conviction for theft, complained that the employee had failed to disclose the fact of his criminal conviction status. That prompted the employer to conduct its own investigations which culminated in charges against the employee for knowingly making a false or incorrect statement.

- [7] In the disciplinary proceedings that were conducted by the employer, the officer presiding in those proceedings found the employee guilty of misconduct and recommended that the employee must be given a final warning. This recommendation was made to the employer, whose chief executive officer is the Superintendent- General (SG). The SG, in the exercise of what he perceived to be his powers and discretion, did not follow the sanction recommended to him by the disciplinary tribunal's presiding officer. Instead, he imposed a penalty of dismissal. There was an appeal against this sanction. The appeal failed.

[8] The employee duly caused the matter to be arbitrated. Right at the beginning, of the arbitration, the employer's representative, Mr. Jonker- who also represented the employee before me, - unequivocally waived any challenge to the employee's dismissal on the basis that there had been a procedural defect in the dismissal of the employee. He stated, that they were not **"going to challenge the procedural fairness of the dismissal"**. I mention this as part of the background facts because the bulk of Mr. Jonker's argument before me was devoted to challenging the dismissal on the basis of its alleged procedural unfairness. To that I will return shortly.

CONDONATION

[9] The employee is well entitled to seek condonation of his late filing of the review application by resorting to the provisions of S158 (1) (f) of the Act. This Court and the Labour Appeal Court have held that an applicant, in order for condonation to be granted must show **"good cause"**. Whether good cause has been shown, both this Court and the one above, have followed the speech by Holmes JA in *Melane v Santam Insurance Co. Ltd 1962 (4) SA 531 (A)* at 532 C- F, to the following effect:

"In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation

thereof, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective *conspectus* of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits".

See also *Rustenberg Transitional Local Council v Siele No & Others (1999) 20 ILJ 2935 (LC)*.

- [10] Condonation will not be granted if the applicant has shown wilful or reckless disregard of the requirements of the rules of court or of a statute.

Smith No v Brummer No 1954 (3) SA 352 (O), Burton v Barlow Rand Ltd 1978 (4) SA 794 (T).

If the applicant either does not explain default or does so unsatisfactorily, condonation will not be granted.

Tommy v Maharaj 1974 (1) SA 178 (N); Ferreira v Ntshingila 1990

(4) **SA 271 (A)**. Further, as soon as a party realises that it has not complied with a Rule of the Court or a Statutory period, it must apply for condonation without delay. ***Commissioner for Inland Revenue v Burger 1956 (4) SA 446 (A); Meintjies v H D Combrinck (Edms) Bpk 1961 (1) SA 262 (A)***.

[11] In heads of argument prepared by Mr. Snider, there is a bald allegation that the employee in its affidavit, has dealt with the issues raised in *Melane's case* “**properly and satisfactorily**”. The heads go on to conclude that the “**degree of lateness is not significant enough to affect the employer's interest in finalising the matter**”. Again, without stating what the facts are, the bold allegation is made that a satisfactory explanation has been provided, that it is clear from the affidavit that the employee took all necessary steps timeously to prosecute the review and that the reason for the delay was due to administrative problems with the attorneys' firm which was dealing with the review. Again without stating how and why, the heads conclude that the employee has good prospects of success, that It is an important matter to him, that he has lost his employment and that he has had his honesty and *bona fide* impugned.

[12] Although Mr. Jonker did not adopt this argument, he did not unfortunately take the argument further. Nor could he have done so. Not only has the employee failed to provide an explanation that negatives wilfulness or reckless disregard, when it endeavors to give an explanation, it gives one that strengthens an inference of wilful

disregard. The allegation that his attorney had given the application to his administrative staff and therefore thought it would be served on the same day by facsimile is not supported by any affidavit from the “**administrative staff**”. No one of the administrative staff- “**they**”- files a confirmatory affidavit and Mr. Jonker’s “**confirmatory affidavit**”, in my respectful opinion, does not take the matter any further.

- [13] Even though the degree of lateness is a matter of a mere 14 days- relatively short,- it seems to me that that in and of itself does not dispose of the requirement that the applicant must show good cause that there was no wilful or reckless disregard of the rules of Court or of the Statute.

In any event, the employee took almost two years to actually file a condonation application. His attorneys had been advised in July 2000 by the employer’s attorney that the review application was out of time and that condonation was necessary. Instead of applying there and then, almost two months later they advised the employers’ lawyers that condonation was unnecessary.

- [14] There is, in the end, no explanation, or at best, no satisfactory explanation why a whole host of things raised by Mr. Hulley, for the Respondents, were not done- why, for example, in its explanation of its default, the employee does not state when it first attempted to transmit its review application by facsimile, why it does not attach the failed fax transmission sheets as proof of its failed attempts, why the application was not transmitted to this Court by some other means,

and so on. The picture gets compounded by the unexplained contradiction on oath in the affidavits where, in one instance, it is deposed that the papers appear to have been served by facsimile, and on the other hand papers were to be served by registered post.

[15] When, in the end, by the 19th September 2000, the employee's lawyers established that the application was sent by registered post, it ought to have been clear, at least by that date, that it would have been filed out of time, and that would have been the time to apply for condonation of the late filing of the review application.

It is unnecessary for me to consider whether the employee has made out a case for condonation on the basis of prospects of success. I have alluded above that the employee had pertinently abandoned, before the arbitration, an attack of the dismissal on procedural grounds. The issue before the arbitrator until shortly before conclusion, was whether the dismissal had been substantively fair or not. In so far as it is in that regard that I would have to consider whether to grant condonation because the employee's prospects of success on review are good, I am satisfied that there are no prospects of success and that condonation should on that ground as well, be refused. I accordingly hold that the application for condonation has no merits and is hereby refused.

[16] **THE MERITS**

Even if I am wrong in refusing condonation, and to the extent that there was full argument of the review application, I am not persuaded

that the employee has made out a case for review on any of the grounds advanced by it.

Most of the facts have already been canvassed above. The essence of the employee's case is that he was entitled to non-disclosure of the criminal offence because his appeal was still pending and that he had assumed that the employer knew of his criminal conviction.

- [17] After the employer had, through the S-G, dismissed the employee, on 23 March 1999, the employee was given an opportunity to appeal. His appeal was dismissed on 17 November 1999. The employee then launched an unfair dismissal proceedings, in which he expressly abandoned the issue of procedural fairness and indicated that its challenge was only against the substantive fairness of the dismissal. The arbitrator, in the award,, held that there was a fair cause to make a finding of misconduct and accordingly upheld the decision to dismiss the employee.

ARGUMENTS IN THIS COURT

- [18] Before me, Mr. Jonker passionately submitted - and this argument was a radical departure from the Heads of Argument filed on behalf of the employee - that the imposition of the dismissal sanction by the employer on the employee, when the tribunal presiding officer had recommended a written final warning was a gross irregularity. It exposed the employee to “**double jeopardy**”. What made the irregularity more gross was that the employer substituted the tribunal's recommended sanction without calling further evidence in mitigation or aggravation, and giving the employee an opportunity to

cross - examine those witnesses that should have been called. The SG, it was argued, should have heard evidence of the Education MEC, Mr Ignatius Jacobs.

[19] Mr Jonker further submitted that the only waiver with regard to procedural fairness was at the inquiry. He submitted that at the arbitration, it had been agreed that the employee would have an opportunity to address the propriety or otherwise of the dismissal sanction, or, as I understood the argument, the fairness or otherwise of the procedure adopted. It was further argued by Mr Jonker that the arbitrator herself grossly misconducted herself insofar as she upheld the dismissal sanction without hearing evidence on mitigating or aggravation factors. Without hearing that evidence, Mr Jonker argued, particularly on whether the trust relationship between the employee and the employer (particularly the SGB) had been broken, the arbitrator deprived herself of an opportunity to apply her own mind as to the propriety or otherwise of the dismissal sanction.

[20] I was referred by Mr Jonker to Dr J Grogan's book: Workplace Law, 6th Edition, Juta, 2001 on page 168 ff:s.v. Double Jeopardy. The relevant sections read as follows:-

“If employees have been acquitted at a disciplinary inquiry, or the presiding officer has imposed a penalty less severe than dismissal, they cannot generally be subjected to a second inquiry of the same offence. Nor may the management ignore the decision of the chairman of a properly constituted

disciplinary hearing and substitute its own decision. A dismissal in such circumstances would invariably be unfair.”

Later on, after the learned author has dealt with the exceptions to this “rule”, he ends the section with the following paragraph, heavily relied upon by Mr Jonker for his submissions:-

“A penalty more severe than that imposed by the presiding official of the disciplinary enquiry may not be imposed by an appeal tribunal.”

The learned author refers to the following authorities for his averments.

Kohidh v Beier Wool (Pty) Ltd (1997) 18 ILJ 1104 (CCMA); Botha v Gengold Ltd [1996] 4 BLLR 441 (IC)

Bhengu v Union Co-operative Ltd (1990) 12ILJ 117 (IC)

- [21] It is worthy of note that in the footnote to the proposition that a more severe penalty than that of the presiding officer of the disciplinary inquiry may not be imposed by an appeal tribunal, Grogan cites, with approval, the ***Kohidh v Beier Wool case***. In the case, there is a suggestion that a more severe penalty can be imposed where the employee appeals, something that is in accordance with the practice in the criminal courts. Grogan suggests, in the footnote, that that is probably the correct approach in labour matters. After all, he argues, the chairman of the appeal must apply his or her mind independently to the facts and the appropriateness of the penalty.

- [22] Mr Jonker further argued that the provisions of the Appeal

Procedures for Educators, as provided for in GNR 1569 dated 7 August 1998, S. 97B were not taken into account. As far as I understand Mr Jonker's submission in this regard, the argument is that this section provides for further information or evidence relevant to the appeal to be obtained by the appeal board within a specified time, which information shall be considered by the board, together with all facts, evidence, documents and the record of proceedings. To that extent, the failure by the Appeal Board in this case to call for further information or evidence with regard to the dismissal sanction amounts to gross irregularity that led to a failure of justice.

[23] Mr Hulley, as I have already indicated, argued that the “**double jeopardy**” argument was never canvassed in the arbitration and was being raised in argument for the first time when it was neither part of the employee's case on affidavit nor the substance of the Heads of Arguments filed. Further, Mr Hulley argued, procedural issues were never canvassed in the arbitration. If anything, right from the start Mr Jonker told the arbitrator that “ the only issue in dispute is the substantive fairness or not of the dismissal”. The arbitrator had asked, later on, as the proceedings were about to commence:

“Commissioner: Let me just check in terms of this; you both agree that the issue in dispute is the substantive aspect of a dismissal? I just want to check?

Mr Jonker: The dispute is by the substantive fairness of the

dismissal (sic). We are not challenging the procedural fairness of the inquiry. (Inaudible) substantive issue, that is clear enough.”

[24] Mr Hulley therefore argued that the appeal procedure argument, and the “**double jeopardy**” argument should have been canvassed at the arbitration proceedings, where they were expressly abandoned. If the employee was keen on a relief by the arbitrator as to whether procedural fairness was to be its case, it should have stopped the proceedings and if a ruling was in its favour, the matter would have had to be postponed, consideration of prejudice and costs taken into account in that regard.

[25] Further, there was no challenge in the affidavits, by the employee, to the accusation that it misinterpreted the true state of affairs with regard to its criminal record. It was not enough for the employee to merely say that it failed to disclose certain facts already within “ **the common knowledge (sic) of the Third Respondent**”. It was even more presumptuous for the employee to allege that the employee had been duly appointed “**whilst the Respondent had full knowledge of the history of the applicant**”.

It was, therefore, not proper for the employee’s lawyer to seek to rely on an argument that is premised on an aspect that was unequivocally abandoned and which was sought to be reintroduced in the arbitration proceedings only in the closing arguments, after the employer’s evidence had been led, which evidence had not been

challenged to the effect that the employer's procedure was or was not fair and proper.

[26] Whilst I have not found in the record anything that seems to reflect whether Mr Jonker had dealt with the “**double jeopardy**” argument in so many words before the arbitrator, I note that the arbitrator has the following to say:

“There is a deliberate attempt by Mr Wium [the employee] to confuse this process (arbitration) by testifying that he is punished twice. Mr Wium is clearly not charged for theft as was convicted by the court of law (sic) The Dept has charged him for misleading the Dept in his application for a Deputy Principal's position.” [on p. 6 of the award]”.

It appears that if the “**double jeopardy**” argument was raised at the closing arguments stage, the arbitrator gave it some consideration.

[27] In any event, Mr Hulley strongly submitted that the only issues before the arbitrator were whether the employee was guilty of the charges against him and, if so, whether dismissal was a fair sanction in the circumstances. There could be no question of his being guilty of gross dishonesty where the employee submitted two curricula vitae which were false, a charge which was not being challenged as much as being explained on the basis that it was a mere non disclosure of a fact peculiarly within the knowledge of the employer.

When once it was accepted that the employee was guilty of the

charge against him, the Court had to determine if dismissal was fair in the circumstances. Was the arbitrator entitled to substitute her decision on sanction for that of the employer, or could she interfere only if she was of the view that the dismissal was so excessive as to shock one's senses?.

**County Fair Foods (Pty)Limited v Commission for Conciliation
Mediation and Arbitration and other (1999) 20 ILJ, 1701 (LAC)**

[28] Firstly, argued Mr Hulley, Mr Maseko, as Head of the Education Department was not obliged to follow blindly recommendations made by the disciplinary tribunal. To do that would be remissness on his part as he had a duty to consider the appropriateness of a sanction recommended to him in the light of the evidence available. Secondly the disciplinary hearing had not imposed any sanction - merely recommended one - and the authorities referred to by Mr Jonker from Grogan's Workplace Law, supra were therefore distinguishable insofar as they refer to the likelihood of a reversal of a decision that substitutes for a sanction imposed by a disciplinary tribunal. Insofar as it was the arbitrator who was faulted for upholding the employer's sanction, without more, as was argued by Mr Jonker, Mr Hulley submitted it was not the arbitrator's function to substitute a sanction imposed by an employer. (See **County Fair Foods case supra**).

[29] Insofar as the employee showed no remorse, and indeed took an attitude that he was “**entitled**” to what he regarded as a mere “**non disclosure**” of a fact peculiarly within the employer's knowledge, Mr Hulley submitted that the employee, who was seeking reinstatement,

cannot hope to re-establish the trust which he had himself broken. As had been stated by Conradie AJA in **De Beers Consolidated Mines Limited v Commission for Conciliation, Mediation and Arbitration and others (2000) 21, ILJ, 1051 (LAC),**

“...[I]t would be difficult for an employer to re-employ an employee who has shown no remorse ... In the absence of a recommitment to the employer’s workplace values, an employee cannot re-establish the trust which he himself has broken. Where, as in this case, an employee over and above having committed an act of dishonesty, falsely denies having done so, an employer would, particularly where a high degree of trust is reposed in an employee, be legitimately entitled to say to itself that the risk of continuing to employ the offender is unacceptably great” (at 1059 C -D)

CONCLUSION

[30] In this case, although strong argument was raised on behalf of the employee that there was evidence led by one member of the SGB that the school would have no problem with the employee, the critical issue is whether, because of that evidence, the arbitrator should not have upheld the dismissal penalty. More importantly, can I interfere? I agree with the authorities that I can only interfere if I am satisfied that the award was not justifiable.

- Carephone (Pty)Ltd v Marcus NO and others (1998)19, ILJ

1425(LAC); County Fair Foods, (supra) at 1706.

[31] I am not persuaded that the arbitrator misdirected herself in any of the ways argued by Mr Jonker. I am satisfied that she applied her mind to all the issues placed before her for consideration, that she expressed herself explicitly on issues she considered irrelevant, and that her conclusions are rationally connected to the evidence and reasons given for them.

In the event, I order as follows:-

1. The application for condonation of the late filing of the review application is dismissed with costs.
2. The application to review the arbitration award of the first respondent is dismissed with costs.

D.B. NTSEBEZA AJ

APPEARANCE

:	Mr Jonker
:	Jonker Smit & Bergh Inc
:	Mr G.I Hulley
:	State Attorney
:	10 July 2002
:	13 August 2002