IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR2423/06

In the matter between:

NATIONAL UNION OF MINEWORKERS	First Applicant
CINDI, SDB	Second Applicant
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	First Respondent
BEST, S N.O.	Second Respondent
ESKOM HOLDINGS LTD	Third Respondent

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JUDGMENT

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FRANCIS J

Introduction

1. The applicants are applying for condonation for the late filing of their review application and an order to review and set aside an arbitration award issued by the second respondent (the commissioner) on 4 June 2004 under case no MP144/03. This was after the commissioner had found that no dismissal had taken place as the contract of employment had automatically terminated as a result of the impossibility of the performance of the second applicant.

2. Both applications were opposed by the third respondent.

The background facts

3. The second applicant commenced employment with the third respondent, Eskom

Holdings Ltd at Tutuka Power Station on 12 June 1985. In 2002 he was arrested about the death of another person that was not work related. After his release on bail, he with representatives of the first applicant (NUM) had a meeting with members of management of the Tutuka Power Station, where he was informed what the possible consequences of a term of imprisonment could be.

4. The second applicant was convicted on a charge of culpable homicide and was sentenced to five years imprisonment. He started serving his sentence on 22 January 2003. Soon after being taken into custody, his term of imprisonment was changed from 5 years to 10 months. He was informed in writing by the third respondent that because he was unable to render his services, the third respondent could no longer accept the situation that amounted to a repudiation of his employment contract that was accepted by it. NUM appealed on his behalf but was informed that he had not been dismissed or discharged from the third respondent's services and that its disciplinary code was not applicable.

5. The applicants referred an unfair dismissal dispute to the first respondent (the CCMA) for conciliation and arbitration. The arbitration hearing was held on 25 May 2004. The parties agreed that no oral evidence would be led and that matter would be argued and was argued on the papers before the CCMA. The third respondent persisted that the termination of employment did not amount to a dismissal. The applicants contended that the second applicant was dismissed and challenged the fairness of the dismissal on several grounds, including that the third respondent had dealt with his case in a different manner from the way in which it had dealt with other employees who had been imprisoned and after their imprisonment sought to continue their

employment.

The commissioner's award

6. The commissioner recorded that the issue that she was required to decide was whether in terminating the second applicant's services, the procedure and substance of the termination was fair and whether this was applied consistently.

7. The commissioner recorded that the third respondent's version was that the second applicant was imprisoned and as a result could not render his services. The third respondent had confirmed with the authorities that he was sentenced and would be serving five years effective from 22 January 2003. Subsequently the sentence was reduced to 10 months. The third respondent could not wait for this period since the second applicant was an operator and the work had to continue. Before his imprisonment, the second applicant was granted bail and a meeting was held. NUM represented the second applicant. At this meeting it was highlighted to the second applicant the consequences of imprisonment. He also received a letter dated 3 February 2003 informing him that because of the length of his sentence, he could not perform his duties and that his services were terminated. Upon notice that his sentence was reduced to 10 months, he was again sent a letter confirming that even with a sentence of 10 months, he was still unable to render his services and the termination would still be valid. The reasons were because of his inability to perform. The third respondent felt that 10 months was a long time and that the second respondent was therefore not dismissed. It followed a reasonable procedure in that the second applicant was informed what the consequences could be if sentenced and it could not be expected of the third respondent to keep a critical post vacant for the

period that he was sentenced. The policy that the second applicant referred to is a document called "Handling Essential Industrial Relations at Eskom". This document is not a policy but a reference guide. The manual should not be read selectively and item 8.9 should also be read. In terms of the issue of Mr Nkosi, he did not fall under the Power Station's jurisdiction. Anyway, if a mistake occurred then, it could not be allowed to continue and had to be corrected.

8. The commissioner recorded that the applicants' version was that the meeting held with the second applicant was only to sensitise him of what could happen. He at the time had not yet been sentenced and the meeting held could therefore not be viewed as procedurally fair. It was understandable to terminate his services if the period was 5 years but this had changed to 10 months. When he was sentenced, the third respondent merely wrote a letter. It was aware of the union's structure and of the policy on how to deal with the matter. The union appealed the decision and the request was rejected. Nothing said was considered. In other cases, the third respondent acted differently, i.e. Nkosi was reinstated after 6 months imprisonment. Another case was settled on 3 months. The employees committed the same offence and were jailed. The treatment was however different. Lukozi for example was allowed unpaid leave. In terms of the third respondent's policy clause 8.7 made provision on how to deal with issues of this nature. When the sentence was reduced, the third respondent should have reconsidered its position. As a result of the policy not making provision for time frames that in its own was inconsistent. Further in terms of the disciplinary policy and procedure, item 5 provides that "no disciplinary action shall be taken against an employee unless he is afforded a proper opportunity to state his case and to defend himself against any facts that may be taken into

consideration against him" and page 68 must be considered. The second applicant sought either reinstatement but would be satisfied with re-employment as long as he could go back to work.

9. The commissioner said that it was common cause that the second applicant was incarcerated. This resulted in him being unable to provide his services to the third respondent. In terms of the ordinary contractual principles, where a contract has become permanently and objectively impossible to perform due to no fault on either party, the contract automatically terminates. In the context of the employment relationship and unfair dismissal law, this would mean that no dismissal took place. The commissioner said that where employees find it impossible to perform, the ordinary principle would apply. If the impossibility is temporary, such as illness or incapacity, the contract is suspended for the period of incapacity. This would also mean that the employer does not need to perform its obligations in terms of the contract either, i.e. no payment would be required for the period of incapacity. However, if the impossibility to perform is either permanent or for a lengthy period such as permanent incapacity or lengthy jail term, the contract automatically terminates once the permanency has been established.

10. The commissioner said that in this matter, because of the second applicant's inability to perform, the third respondent accepted the second applicant's repudiation of the contract. This was done in a letter dated the 3 February 2003 and reiterated on the 4th February 2003. The pertinent clause reads as follows: "Eskom Tutuka Power Station can no longer accept the situation that amounts to a repudiation of your employment contract that is accepted by Eskom". The commissioner, as a result found that no dismissal took place as the contract automatically terminated because of the

impossibility of the performance of the second applicant. He was therefore the author of his own misfortune. He dismissed the matter and ordered the CCMA to close its file.

The grounds of review

11. It was clear on the facts that were before the commissioner that the third respondent's decided to terminate the contract of employment and its decision fell squarely within the definition of a dismissal as contained in section 186(1)(a) of the Labour Relations Act 66 of 1995 (the Act). The commissioner's finding that the contract of employment automatically terminated was legally wrong. The commissioner's finding that the second applicant's termination of employment did not amount to a dismissal was untenable on objectively justiciable grounds. The commissioner committed gross irregularities in the conduct of the proceedings, misconducted herself in relation to her duties as a commissioner and exceeded her powers. The award should be reviewed and set aside.

The condonation application

12. The review application was filed by the applicants on 9 September 2006. It was filed 2 years and two and half months late. The period is a lengthy one. The applicants indicated in the review application that they would be applying for condonation once they had obtained information from a number of different persons and would also address the question of their prospects of success fully after their attorneys had obtained the record of the proceedings under review. The application for condonation was filed on 30 June 2008.

13. The founding affidavit in support of the condonation application sets out the explanation for the delay. The explanation in essence is that before the six-week period provided for in section 145 of the Act, the first applicant obtained an opinion from its attorney at the time, an experienced labour lawyer, that there was no prospect of success on review of the award. The union accordingly decided not to review the award. The second applicant on the other hand, at all material times, wished to lodge a review application. He was, however, unable to do so on his own as he did not have the money to pay for the legal assistance required. In the circumstances he adopted the view that his only chance of successfully reviewing the award was to persuade the union to bring the application. After two years of persistence he persuaded the union to obtain a second opinion and, when this opinion differed from the original opinion, the union decided to launch the application. The condonation application was included in the applicants supplementary affidavit, which was filed soon as the record of the proceedings under review had been finalised.

14. The applicants contended that given the strength of their prospects of success on the merits of the review, the obvious importance of the case to the applicants, the fact that the second applicant was not responsible for the delay and that the delay of the union has been explained, condonation should be granted in this matter.

15. The condonation application was opposed by the third respondent. During arguments the challenge was limited more to the delay in applying for condonation. It was contended that the application for condonation should have been filed when it became clear that there was a need to do so. This Court was referred to various judgments of

this Court, the Labour Appeal Court and other Courts dealing with condonation. It is not necessary to repeat those cases. What is important from those cases is that each matter should be determined on the circumstances of each case. This Court ultimately has a discretion when considering an application for condonation and it should exercise its discretion judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both parties. In this regard see *Melane v Santam Insurance Co Ltd* 1962 (4) SA 532 (A), where Holmes JA explained the relevant principles applicable as follows:

".... 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 therefor, 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."

16. I am satisfied that the applicants have given an adequate explanation for the late filing of the review application. The reasons for the late filing cannot in the circumstances

of this case be said to be scant.

17. This brings me to the issue about why the condonation application was not filed either with the review application or so soon thereafter. It is trite that an applicant is required to bring an application for condonation when the applicant realizes that he or she has not complied with a rule, without delay. Again this will depend on the circumstances of each case. The applicants knew that they had to apply for condonation but have provided reasons why they did not do so when they filed the review application. It needed to obtain more information from the persons who had assisted the second applicant. They had passed away. It also needed to obtain a transcript of the arbitration proceedings. The prospect of success is a requirement for condonation and these could only be ascertained after having obtained a transcript of the arbitration proceedings. This is not a case where the principle was ignored but an explanation was tendered when the review application was filed why the condonation application could not be filed. The explanation tendered for filing the condonation application late is also satisfactory.

18. Since there are excellent prospects of success, condonation stands to be granted as will become clear when I deal with the review application.

The review application

19. The dispute between the parties concerns an alleged unfair dismissal of the second applicant that was referred to arbitration in terms of section 191 of the Act. The second applicant's services were terminated on 3 February 2003 after he was convicted on a charge of culpable homicide and sentenced to a five-year term of

imprisonment that commenced on 22 January 2003. His term of imprisonment was reduced to 10 months.

20. In his letter of termination, the second applicant was informed that the third respondent could not accept the fact that he was unable to tender his services because of him being imprisoned, that this amounted to a repudiation of his contract of employment and that the third respondent accepted his repudiation. Consequently, his contract of employment was cancelled with immediate effect. The third respondent contended that the second applicant was not dismissed or discharged from its service and he was accordingly not allowed an appeal in terms of its disciplinary code. At the arbitration hearing, the third respondent persisted in its view that the termination of the second applicant's employment did not amount to a dismissal.

21. The only reason that the commissioner advanced in her arbitration award for her decision was that because of the second applicant's inability to perform, the third respondent accepted the second applicant's repudiation of the contract. No dismissal took place as the contract automatically terminated because of the impossibility of the performance of the second applicant. He was the author of his own misfortune.

22. There are a number of decisions of this Court that deals with the issue that the commissioner was required to decide. These are *Trident Steel (Pty) Ltd v CCMA and Others* (2005) 26 ILJ 1519 (LC); *Lebowa Platinum Mine Ltd v CCMA & Others* (2002) 5 BLLR 429 (LC) and two unreported judgments in *Samancor Limited / Metal and Engineering Industry Bargaining Council and Others* JR1061/07 and *Eskom Limited v CCMA and Others* case number JR2025/06 both delivered on 1 July 2008.

The commissioner did not refer to any of those judgments in her award that would have guided her in deciding the issue. The commissioner's award is also contradictory. She said that if the impossibility is temporary, such as illness or incapacity, the contract of employment is suspended for the period of incapacity. However, if the impossibility to perform is either permanent or for a lengthy period such as permanent incapacity or a lengthy jail sentence, the contract automatically terminates once the permanency has been established. The commissioner has made no finding about whether the impossibility to perform was permanent or for a lengthy period and despite failing to decide this issue, found that no dismissal had taken place.

23. In terms of *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC), in deciding whether an award is reviewable the only question that needs to be asked is: Is the decision reached by the commissioner one that a reasonable decision maker could not reach? This Court is concerned with the reasonableness of the conclusion itself. If the outcome is reasonable, it does not matter that there are flaws in the reasoning employed by the commissioner. This Court is not concerned whether the commissioner was correct or whether it agrees with the commissioner. There is a range of decisions that will fall within the bounds of reasonableness by the Constitution. This Court must simply ensure that the commissioner's decision falls within those bounds. To succeed, the applicants must establish that the decision falls outside the bounds of what are reasonable. The commissioner's finding is not one that a reasonable-decision maker could reach and is therefore reviewable.

24. I am acutely aware that this matter should be referred to the CCMA and do not wish to express any views about whether the period of incarceration could be construed as

lengthy or a permanent one. These are the issues that a commissioner should decide clearly guided by case law.

25. The application stands to be granted.

26. The applicants due to the state of the arbitration record sought that the dispute be reviewed and set aside and referred to the CCMA for a *de novo* hearing before another commissioner other than the second respondent. I am inclined to do that.

27. Both parties sought costs against the other. There is no reason why costs should follow the result.

28. In the circumstances I make the following order:

28.1 The applicants' application for condonation is granted.

28.2 The arbitration award issued by the second respondent on 4 June 2004 under case number MP144/03 is reviewed and set aside and is referred to the CCMA for a *de novo* hearing before another commissioner other than the second respondent.

28.3 The third respondent is to pay the costs of the application.

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FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT:	H VAN DER RIET SC INSTRUCTED BY CHEADLE THOMPSON & HAYSOM
FOR THIRD RESPONDENT:	G FOURIE INSTRUCTED BY KUNENE RAMAPALA BOTHA ATTORNEYS
DATE OF HEARING:	26 FEBRUARY 2009
DATE OF JUDGMENT:	13 MARCH 2009