IN THE INDUSTRIAL COURT OF APPEAL

HELD AT MBABANE CASE NO. 18/2003

In the matter between:

THULANI F. SIKHONDZE **APPELLANT**

and

CIVIL SERVICE BOARD **1st RESPONDENT**

ATTORNEY GENERAL **2nd RESPONDENT**

CORAM : M.M. RAMODIBEDIJP
M.C.B. MAPHALALA AJA
N. J. HLOPHE AJA

HEARD: 7th SEPTEMBER 2010

DELIVERED: 17TH SEPTEMBER 2010

SUMMARY

Labour Law - Whether condonation possible where appeal noted oat of the three months period prescribed by Section 19 (1) of the Industrial Relations Act 2000 as amended -Whilst appeal noted timeously in terms of the Industrial Relations Act 2000 as amended, record of proceedings filed three years and three months after lapse of the period of one month within which a record ought to be filed in terms of Rule 21 (1) of the Industrial Court of Appeal Rules 1997 -Appeal deemed abandoned in such circumstances in terms of Rule 21 (4) - Whether condonation of late filing of the record possible in that case -Considerations to be taken into account by Court in exercising its discretion whether or not to condone such non-compliance - Extent of the non-compliance and the availability of reasonable prospects of success part of the considerations.

JUDGMENT

HLOPHE AJA

[1] On the 14th October 2003, the Industrial Court handed down a judgment in terms of which it dismissed an application by the Appellant who had instituted proceedings against the First Respondent claiming to have been unfairly dismissed and therefore sought the relief which is availed to an unfairly dismissed employee by law.

[2] In its judgment aforesaid, the Industrial Court found, after listening to the evidence, that the dismissal of the Appellant was fair and was reasonable when taking into account all the circumstances of the

matter.

[3] The evidence revealed that the dismissal of the Appellant (then Applicant) came about after he was charged with, and indeed found guilty of, some five counts of misconduct by the First Respondent. The said counts entailed his having absented himself from work for a total of 183 days, his unauthorised knocking off from work before time, as well as three separate counts of false or fraudulent misrepresentation in terms of which he had misrepresented to his employer by means of a letter purportedly written by the Police in one instance, and two separate supposed Doctor's Reports purporting to confirm that his being absent from work on the days specified in the said documents, was either because he had been arrested and kept in police custody, or because he was given sick leave by the two doctors at the Mbabane government hospital, who allegedly treated him, on different occasions, for alleged different ailments. These incidents of false or fraudulent misrepresentation were found as a fact by the Court a quo to have been false and as such amounted to dishonesty, which in law is a fair ground for dismissal as it is said to go to the root cause of the employment relationship. See in this regard **Central News Agency v CCAWUSA & Another (1991) 12 ILJ 340 (LAC) at 344 F - I.**

As the Court a quo had found as a fact that the acts of misconduct

were proved against the Appellant, it invariably found that the dismissal of the Appellant was fair and reasonable when taking into account all the circumstances of the matter. Our reading of the record confirms that the Court *a quo* was justified to find as it did including its coming to the conclusion it did in the end.

[4] On the 9th December 2003, the Appellant noted an appeal to this Court on the following grounds are quoted verbatim:-

4.1. The Court a quo erred in fact and in law in dismissing the Appellant's matter on five counts instead of two counts of "absence from work" and "reporting late at work" which counts the Disciplinary Tribunal tried.

4.2. The Court a quo erred in law and in fact in finding that the Appellant was transferred from the Income Tax to the Ministry of Public Service and Information on (sic) since the correct concept is that Appellant got the variation of post from one Department to the other.

4.3. The Court a quo erred in law and in fact by finding that the Appellant was given a chance for rehabilitation since Appellant arrived at the Ministry of Public Service and Information in March 1997, and was charged in May 1997 which shows that the period was too short to allow Appellant to rehabilitate.

4.4. The Court a quo erred in law and in fact by finding that the Appellant was violent yet the Disciplinary Tribunal and the Civil Service Board never tried the Appellant on the counts of violence but only appears in the dismissal letter and the Court a quo.

4.5. The Court a quo erred in law and in fact by not calling Appellant (sic) immediate supervisor, Obed Dlamini to give evidence in the Court *a quo* yet the evidence of this witness was vital in the circumstances.

[5] There is an anomaly in the grounds of appeal as they are couched in such a manner as to indicate that they seek to challenge the Court's factual findings when the position is settled from the provisions of the Industrial Relations Act as well as several decisions of this Court that an appeal to this Court can only lie on a question of law and not on a finding of fact. See in this regard **VIP Protection Services v Simon Nhlabatsi (ICA) Case No. 10/2004** as well as **Bhekiwe Dlamini vs Swaziland Water Services Corporation (ICA) Case No. 13/2006.** See also Section 19 (1) of the Industrial Relations Act 2000 as amended.

[6] It is noted for the record and perhaps in fairness to Mr. Lukhele, that the Appellant appears to have prepared the Notice of Appeal in person which perhaps justifies the glaring shortcomings referred to in

the foregoing paragraph.

[7] Notwithstanding the noting of the appeal on the date set out above, which was clearly in accord with the provisions of Section 19 (3) of the Industrial Relations Act 2000, (which requires that such be done within three months of the date of Judgment), the record of proceedings was not prepared and lodged within the one month period of the noting of the appeal as provided for in Rule 21 (1) of the Industrial Court of Appeal Rules. Instead the Appellant purported to prepare and lodge the said record on or about the 22 March 2007, which was clearly over by three years three months of the time stipulated in Rule 21 (1) of the Rules. Notwithstanding the lodging of the said record being out of time, no condonation application was filed in this regard.

[8] Owing to the objection to the appeal taken by the Respondents and the decision we have come to, following our hearing the submissions in Court, it is imperative that one briefly captures the legal position on condonation as entails before this Court.

[9] In terms of Rule 21 (4) of the Industrial Court of Appeal Rules 1997, if an Appellant fails to submit a record for certification (prepare and

lodge a record) within the one month period from the noting of the Appeal provided for in Rule 21 (1), the appeal shall be deemed to have been abandoned.

[10] Rule 16 (1) of the Industrial Court of Appeal Rules authorises or empowers the Judge President of the Industrial Court of Appeal or any designated Judge of the Industrial Court of Appeal to extend any time limit prescribed by the Rules. On the other hand Rule 17 empowers the Industrial Court of Appeal or any Judge thereof to excuse any party from failure to comply with any of the provisions of the Rules, including giving it power to give direction in matters of procedure as it considers just and expedient. Such non-compliance will however be condoned only if there are reasonable prospects of success on appeal among the other requirements such as the extent of the non-compliance. See in this regard **Bezuidenhout v Dippenaar 1943 AD 190** as well as **UNITRANS Swaziland Limited v Inyatsi Construction Limited Appeal Civil Case No. 9/96 unreported.**

[11] Whilst this Court has no power to condone a failure to note an appeal within the three months period provided for in Section 19 of the Act, there is no doubt that the Court does have power to condone a failure to file a record within the one month period from delivery of judgment provided for in the Rules. The rationale is that where the

time limits are set by the statute without it further giving this Court the power to condone the failure to comply with the said statutory provision, this Court has no power to condone such failure as it cannot in law extend the period set by statute. A case in point here is the **Manzini City Council v Workers Representative Council (ICA) Case No. 2/1999** where this

Court per its then President, SW SAPIRE with the members thereof concurring, expressed the position as follows at page 4:

> "*There would however be difficulty with condonation of the late noting of the Appeal. The time for noting the Appeal is fixed by statute which makes no provision for the Court to extend the period or to condone noncompliance therewith. The only conclusion to which it is proper to come is that the Legislature intended that the appeal had to be noted within the three months allowed, without the possibility of condonation or extension where the appeal was not timeously noted. Mr. Flynfor the Respondent referred us to Rule 17, which gives the Court power to excuse noncompliance with the rules. This rule refers specifically with noncompliance with the rules. It does not and could not apply in cases of noncompliance with the terms of the statute itself.*"

On the other had the Court can always condone a failure to comply with the provisions of the Rules of Court as the rules are its creature provided certain requirements are met.

See in this regard **Sibusiso Boy Boy Nyembe v Pinky Lindiwe**

Nyembe (born Mango) Supreme Court of Appeal Case No. 62/2000 as well as **Manzini City Council v Workers representative Council (Supra).**

[12] For condonation to be granted a party who has failed to comply with the provisions of the Rules of the Industrial Court of Appeal, an application in which sufficient cause is shown has to be made according to Rule 17.

[13] In the present matter, it is common cause that the record was filed after the lapse of the one month period from the noting of the appeal, and precisely after the lapse of over three years and three months. It is further common course that when the Appellant purported to file the said record, no application for the condonation of this apparent failure to comply with the Rules of Court was made. There was consequently not even an attempt to establish good or sufficient cause, as envisaged in terms of the Rule referred to above; nor was there an attempt to set out what prospects of success if any the Appellant had as required of him by the Practice of this Court as set out in several of its judgments and those of the Supreme Court. See in this regard **UNITRANS Swaziland Limited vs Inyatsi Construction Limited** delivered on 7th

November 1997 (unreported] as well as **Commissioner For**

Inland Revenue v Burger 1956 (4) SA 446.

[14] The position is settled as captured in paragraph 10 above, that in considering whether or not to grant condonation, the Appeal Court has to consider among other issues, the extent of the non-compliance as well as the prospects of success.

[15] On the extent of the non-compliance as a factor, the Court of Appeal had the following to say in **Unitrans Swaziland Limited vs Inyatsi Construction Limited** (Supra).

> "*In considering whether to grant condonation the Court, in the exercise of its discretion must, of course, have regard to all the facts. Amongst those facts are the extent of the no-compliance, the explanation therefore and the Respondent's interest in finality.*"

[16] On the prospects of success as a factor, the Supreme Court of Appeal in **Sibusiso Boy Boy Nyembe vs Pinky Lindiwe Nyembe (born Mango) Appeal Case No. 62/2008,** whilst quoting an excerpt from **Bezuidenhout v Dippenaar 1943 AD 190,** put the position as follows:-

> "*Whatever the position might have been if the Applicant had applied for leave to this Court before the prescribed period of three months*

had elapsed, it seems to me that in view of the fact that the Appeal has already lapsed, the Court should not grant the Applicant any form of relief if it is satisfied that there is no reasonable prospect of the appeal succeeding."

Although the Court was dealing with condoning the failure to note an appeal which is possible in practice before the Supreme Court, the principle as regards the consideration of prospects of success as a factor to decide whether or not to grant condonation for the failure to timeously file a record is apposite in my view.

[17] Notwithstanding that the record was filed in March 2007 as above stated, no substantive application for condonation, nor Heads of Argument were ever filed by the Appellant. This was despite the fact that the matter had been allocated a hearing date this session as far back as some time in July 2010. Even after the Respondent had filed its Heads of Argument as at

27th August 2010, the Appellant made no move to correct any of the shortcomings referred to above.

[18] When the matter was eventually called in Court, Mr. Lukhele for the Appellant informed the Court that the matter was in his view not ripe for a hearing and that although he could not secure an agreement in this regard from his counterpart Mr. Khuluse, he was pleading that

the matter be postponed to the next session. This, the Court rejected in view of the shortcomings referred to hereinabove as well as the objection in that regard by Mr. Khuluse, who had prepared detailed submissions per his Heads of Argument on the question of the Appeal being deemed abandoned and there being no condonation application. It must be stated that the record also contains a letter from Dunseith Attorneys, dated the 3rd February 2010, in which the said attorneys asked the Registrar to enrol the matter in this session. It was therefore not appropriate for Mr. Lukhele to then ask for a postponement on the face of such a request by him.

[19] Mr. Lukhele then submitted that this Court had to do what it considered just in the circumstances as he could not argue contrary to the observations of the Court referred to above. Mr. Lukhele sought to attach the blame on the incomplete record even though he indicated that the one filed was prepared from the notes of the learned Judge *a quo.* It must be indicated that it was common cause that whatever shortcomings there were on the record, they were not major as the Court could follow what transpired in Court and the shortcomings referred to were actually not revealed, let alone how they prejudiced the Appellant's case, if at all they did.

[20] The parties were then urged to address the Court in the merits of

the matter and on the prospects of success; Mr. Lukhele still preferring to say that he could only urge the Court to do what it considered just. Mr. Khuluse submitted that the appeal be dismissed on the grounds that there having been no condonation application filed, the Appeal was deemed abandoned and as such there was none pending before Court. His preparations were centred around this point alone and he

> His preparations were centred around this point alone and he could not delve much on whether or not there were prospects of success on appeal, except to make a bare statement that the Appellant had no such prospects.

[21] We could not allow a postponement of the matter to the next session because no sound reasons were given to us why a substantive condonation application could not have been made nor was there any sufficient cause set out on why the appeal could still be heard notwithstanding it having been deemed abandoned in terms of the Rules together with the fact that no condonation application had been made as required by the Rules of Court.

> Parties should not lose sight of the policy in Labour matters which is that such matters should be resolved expeditiously and less costly. In any event the extent of the non-compliance and the failure to file a condonation application timeously makes it very difficult, if not impossible, for the Court to exercise its discretion

in such a matter in favour of the Appellant as stated in the **UNITRANS Swaziland Limited vs Inyatsi Construction** case referred to above.

[22] Our stance is further fortified by the fact that from the record availed, which was certified as a true and accurate record of the proceedings as recorded by the learned Judge, it is clear that the Appellant had no reasonable prospects of success in the merits. Indeed none of the parties could argue otherwise. This lack of prospects can be observed from the fact that the Court *a quo* did not only make factual findings of the Appellant's misconduct (which is not appealable in terms of the Industrial Relations Act), but the offences of which the Appellant was found guilty and subsequently dismissed are shown *ex facie* the record as proved before the Industrial Court and are indeed dismissible offences in law as found by the Learned Judge *a quo.*

[23] On the other hand no legal grounds of appeal were set out by the Appellant in his Notice as he seemed to quibble factual findings as opposed to raising legal issues. In any event the grounds of appeal raised do not seem to be going to the core of the matter as a decision on them does not seem capable of making the Court come to a completely different decision.

[24] We have consequently come to the conclusion that the appeal be dismissed and we, to that end, make the following order: -

24.1. The request that the appeal be postponed be and is hereby refused.

24.2. Following the failure by Appellant to apply for condonation as envisaged in terms of the Rules of this Court, and the conclusion by this Court that there are no reasonable prospects of success in the merits of the matter, the appeal be and is hereby dismissed.

24.3. The order of the Court a quo dismissing the application with costs, be and is hereby confirmed.

24.4. The costs of this appeal are to be borne by the Appellant.

N. J. Hlophe
ACTING JUSTICE OF APPEAL

I agree

M.M. Ramodibedi
JUDGE PRESIDENT

I agree

M.C.B. Maphalala

ACTING JUSTICE OF APPEAL

For the Appellant : Mr. A. M. Lukhele

For the Respondent : Mr. S. Khuluse

M M . Ramodibedi-
JUDGE PRESIDENT

M.C.B. Maphalala ACTING
JUSTICE OF APPEAL