IN THE LABOUR APPEAL COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: JA 41/03

In the matter between:

MAGALIES WATER BOARD **Appellant**

and

PIET THULARE **Respondent**

JUDGMENT

Zondo JP

Introduction

[1] On the 14th September 2004 this Court made an order dismissing with costs the appellant's appeal in this matter and indicated that reasons would be furnished if either party requested them. Subsequently, reasons for that order were requested. These are they.

[2] This is an appeal from an order of Landman J sitting in the Labour Court in an application which had been brought by the present respondent against the present appellant in terms of which that Court made a certain arbitration award an order of that Court in

terms of sec 158(1)(c) of the Labour Relations Act, 1995 ("**the Act**"). The award was that of a commissioner of the Commission for Conciliation, Mediation and Arbitration (the "**CCMA**") which had been made pursuant to arbitration proceedings relating to a dispute between the two parties about the fairness or otherwise of the dismissal of the respondent by the appellant. Leave to appeal was granted by the Labour Court. Before I can deal with the merits of the appeal, it is necessary to set out the facts.

The facts

2.1 The respondent had been employed by the appellant but was dismissed from such employment on, or, with effect from, the 25th November 1997. A dispute arose between the appellant and the respondent about the fairness of that dismissal. Thereafter a certain sequence of events followed which is set out below:

2.1.1 On the 29th December 1997 the dispute was referred to the CCMA for conciliation. Attempts at conciliation failed and on the 27th January 1998 the CCMA issued a certificate of outcome to the effect that the dispute remained unresolved.

2.1.2 The dispute was thereafter referred to arbitration under the auspices of the CCMA.

2.1.3 On the 14th July and 21st August 1998 the arbitration took place.

2.1.4 On the 5th October 1998 the commissioner of the CCMA who had conducted the arbitration issued an award. In terms of that award the commissioner found that the dismissal was substantively unfair but

procedurally fair. The award he issued was in the following terms:-

"**36. In the light of the conclusions and the circumstances discussed above, I order the [the appellant] to reinstate [the respondent] retrospectively to 1st July 1998, provided that:-**

36.1 he reports for duty at the [appellant's] premises within 14 days of this award being served on the Union;

36.2 he acknowledges in writing on his return to work that he has received a final written warning both for failing to obtain authorisation for his absence from his work station on 17th November 1998 and for disregard of Board rules and regulations;

36.3 he acknowledges to the Board in writing on his return to work that a copy of this award has been given and explained to him by the union;

36.4 the previous final warning received on 25th August 1998 shall continue to operate for a further three months from the date of his return to work.

36.5 the period between the date of his dismissal and 1st July 1998 shall be regarded as a period of suspension without pay.

37. Further, I order that within 14 days of his return to work, the board shall pay [the respondent] the normal remuneration he would have received if he had worked ordinary hours from 1st July 1998 to the date of his return to work."

2.1.5 At some stage prior to the 21st September 2001 – it is not clear exactly when – the appellant launched an application in the Labour Court in terms of sec 145 of the Act for an order reviewing and setting aside the arbitration award.

2.1.6 On the 21st September 2001 the Labour Court, through Jammy AJ, dismissed the appellant's review application with costs.

2.1.7 On the 22nd November 2001 the respondent's attorney addressed a letter to the appellant's attorney informing him that the respondent would be returning to work on Monday the 3rd December 2001 and that the appellant should prepare a cheque on that day for his wages for the period from the 1st July 1998 to November 2001.

2.1.8 On the 23rd November 2001 the appellant's attorneys responded to the effect that they had been instructed to apply for leave to appeal against the judgment and that the respondent should, therefore, not report for work on the 3rd December 2001.

2.1.9 On the 29th November 2001 the respondent's attorney wrote a letter to the appellant's attorneys in which he suggested, among other things, that there was no basis for the appeal that the appellant was contemplating, urged them to deliver the appellant's application for leave to appeal within the prescribed time limits and advised that, if the appellant's application for leave to appeal was not delivered by the 12th December 2001, the respondent would report for duty on the 13th

December 2001. The appellant failed to deliver the application for leave to appeal by the 12th December.

2.1.10 On the 13th December 2001 the respondent reported for duty but was turned away by the appellant and informed that the case was being taken on appeal.

2.1.11 On the 24th January 2002 the respondent's attorney wrote a letter to the appellant's attorneys and sought an undertaking from the appellant by close of business on the 29th January 2002 that it would accept the respondent's tender of services and would pay him his wages for the period from 1998 to the 24th January 2002; the respondent's attorney threatened that, if such undertaking was not given, he would make an application to the Labour Court to have the arbitration award made an order of that Court and would seek an adverse costs order against the appellant. The appellant failed to provide such undertaking.

Proceedings in the Labour Court

2.1.12 Accordingly, on the 15th February 2002 the respondent launched an application in terms of sec 158(1)(c) of the Act in the Labour Court to make the award an order of the Labour Court. An order was also sought for the payment by the appellant of an amount of R85 776, 47 which was alleged to be the total amount owed by the appellant to the respondent in terms of the arbitration award. Furthermore, an order of costs

on the scale as between attorney and client was also sought.

2.1.13 By the 1st August 2002 the appellant had not indicated any intention to oppose the respondent's application and specifically had not delivered any answering affidavit to the sec 158(1)(c) application.

2.1.14 On the 15th August 2002 the Registrar of the Labour Court set the application to make the award an order of Court down for hearing on the unopposed roll on for the 18th September 2002.

2.1.15 On the 19th August 2002, which was more than five months after the respondent had launched the sec 158(1)(c) application, the appellant delivered an answering affidavit to oppose the sec 158(1)(c) application and an application for leave to appeal against Jammy AJ's judgment dismissing the appellant's application to review and set the award aside; the delivery of this application for leave to appeal was over eight months late; the appellant also delivered an application for condonation in respect of both the answering affidavit in the sec 158(1)(c) application and in regard to the application for leave to appeal; the delivery of the answering affidavit was more than four months late.

2.1.16 Subsequently the sec 158(1)(c) application was removed from the unopposed roll. On the 11th September 2002 Jammy AJ dismissed the application for leave to appeal against his judgment which dealt with the appellant's review application.

2.1.17 The appellant's answering affidavit in support of its opposition to the sec 158 application was deposed to by its attorney. The basis for the appellant's opposition was that the appellant's "**debt**" to the respondent had prescribed. The "**debt**" was alleged to be the appellant's obligation in terms of the arbitration award to reinstate the respondent and to pay him compensation. The appellant alleged that such obligation was a debt as contemplated by the Prescription Act, 1969 (Act 68 of 1969).

The appellant adopted the attitude that the respondent was required to have brought the application to make the award an order of Court within three years from the date when the award was issued and that, upon the expiry of such period, in terms of sec 10(1) of the Prescription Act the claim had prescribed. In this regard the appellant relied upon the provisions of sec 11(d) of the Prescription Action. It alleged that the debt had arisen on the 5th October 1998 when the award was issued and that from that date a period of three years had elapsed. In due course the sec 158(1) application was set down for hearing.

2.1.18 The first question that the Labour Court had to consider was whether or not the appellant had shown good cause for the late delivery of its answering affidavit. If it concluded that good cause had been shown, it would grant condonation and then proceed to deal with the sec 158(1)(c) application on the merits and taking into account the appellant's basis for its

opposition of the application, namely, that the claim had prescribed. If, however, it found that the appellant had failed to show good cause, it would dismiss the application for condonation and, strike the answering affidavit out.

2.1.19 The Labour Court dealt with the appellant's condonation application and concluded that there was no proper basis to grant it. It, accordingly, dismissed the application. The Court then proceeded to make the award an order of Court, ordered the appellant to pay the respondent "**the amount of money owing to him for a period dating from 5 October 1998 until today"** and to pay the costs of the sec 158(1)(c) application on the scale as between attorney and client. The Labour Court did not consider the appellant's defence on the merits, namely, prescription, because it had dismissed the appellant's condonation application.

2.1.20 Subsequently, the appellant brought an application for leave to appeal against the judgment of the Labour Court. According to the judgment of the Labour Court on the application for leave to appeal, there were 12 grounds upon which the appellant sought leave to appeal. However, the Labour Court considered only four of these. I assume that it did not consider the others because they were abandoned or were not pursued. The appellant has not complained about the Labour Court's decision to consider only four of the grounds and to leave out the others.

2.1.21 The four grounds all related to prescription. They read thus:-

"**1. The learned judge erred in law in not upholding the appellant's defence of prescription in this matter;**

2. The learned judge erred in fact and in law in not determining the issue of prescription irrespective of the issue whether or not condonation for the late filing of the [appellant's] answering affidavit had not been granted;

3. The learned judge erred in law in not determining that the appellant was entitled to raise the defence of prescription [at] any stage of the proceedings, and that such defence was before Court at the hearing of this matter which required it to be determined on the merits;

4. The learned judge erred in fact and in law in making the arbitration award in favour of the respondent and (sic) order of Court having regard to the fact that the award has become prescribed as a result of no longer existed in law (sic)".

[3] In its judgment on the application for leave to appeal, the Labour Court stated that, having dismissed the appellant's application for the condonation of the late delivery of its opposing affidavit, it was of the view that the sec 158(1)(c) application should be dealt with

as an unopposed application. The Court further stated that, having dismissed the appellant's condonation application, it was neither necessary nor competent for it to consider the defence of prescription raised in the appellant's answering. However, the Labour Court expressed the view that there was a reasonable prospect that another Court may come to a different conclusion regarding the defence of prescription and went on to make an order in the following terms:

"1. The respondent in the sec 158(1)(c) application is granted leave to appeal against that part of my judgement dismissing the [appellant's] defence of prescription.

2. Costs are to be costs in the appeal."

The appeal.

[4] The Labour Court did not in its main judgment dismiss the appellant's defence of prescription. What it dismissed was the appellant's condonation application relating to the late delivery of the appellant's answering affidavit containing the defence of prescription. It did not consider the appellant's defence of prescription at all. What would have been the point of the Court dismissing the condonation application if it was going to consider the appellant's defence on the merits irrespective of the outcome of the application for the condonation of the late delivery of the answering affidavit containing such defence?

[5] The whole point of the condonation application was that, if condonation was granted, the appellant's defence contained in the answering affidavit would be considered but that if it was dismissed, the appellant would lose the right to have its defence

considered by the Court. If the appellant was entitled to have its defence considered irrespective of the outcome of the application for condonation, there would have been no point in bringing the condonation application in the first place. The appellant did not seek to appeal against the order of the Labour Court dismissing its application for condonation. Without appealing against that order, the appellant's appeal is academic.

[6] It was plainly not competent for the Labour Court to consider the defence raised in the answering affidavit despite an order refusing condonation of the late delivery of such affidavit. An order dismissing the application for condonation of the late delivery of the appellant's answering affidavit meant that the defence contained in such affidavit could not be considered. Also, once the Labour Court had dismissed the condonation application, it was not even competent for the Labour Court to *mero motu* consider prescription (see sec 17(1) of the Prescription Act, 1969 (Act 68 of 1969). The proviso in the second part of sec 17(2) of the Prescription Act gives a Court power to allow prescription to be raised at any stage of the proceedings. That means that the Court has a discretion but that applies where a party has not lost the right to have its defence considered. The decision to dismiss the condonation application was in effect a bar to the appellant taking any further part in the matter.

[7] I have said that the appellant did not seek to appeal against the order of the Labour Court dismissing its condonation application. I am surprised at the fact that the appellant seems to have thought that it could get this Court to pronounce on the merits of its defence

of prescription contained in its answering affidavit and at the fact that the Labour Court granted leave to appeal on the merits of the appellant's defence when there was no challenge to the order of that Court dismissing the appellant's condonation application. However, I am not surprised at the fact that the appellant did not seek to appeal against the order of the Labour Court dismissing its condonation application. I say this because, when one has regard to the explanation given by the appellant's attorney, for the appellant's delay in the delivery of its opposing affidavit, it is clear that, although he seeks to blame a certain Advocate Nel whom he says he had instructed to prepare an answering affidavit in this matter, he himself shoulders much blame for the fact that the appellant's answering affidavit was not delivered timeously.

[8**]** The respondent's attorneys delivered and served the respondent's sec 158(1)(c) application on or about the 15th February 2002. The appellant's attorneys were required to have delivered the appellant's answering affidavit within 10 Court days. That period expired around 1March 2000.

[9] The affidavit in which the appellant's attorney provided an explanation for the delay in delivering the answering affidavit is the same affidavit which he used to apply for the condonation of the late delivery of the appellant's application for leave to appeal against the judgment in the review application. In that affidavit the first mention that the appellant's attorney makes of the present matter is where he says that, due to his firm having discovered that Advocate Nel had failed to handle or had mishandled a number of matters which the firm had briefed him to handle, his firm

terminated its relationship with him on the 7th June 2002. The appellant's attorney also states in the affidavit that subsequently he discovered the respondent's sec 158(1)(c) application in "**a pile of scrap paper which is collected from the offices of the various professionals to be used for the printing of telefaxes."**

[10] The appellant's attorney does not say in his affidavit when it was that he found the sec 158(1)(c) application. However, he stated in a certain letter that he found the sec 158(1)(c) application on the 22nd July 2002. Earlier in the affidavit he had said that **"in May and June 2002"** his firm had discovered several instances where Advocate Nel had "**failed to discharge matters (sic) entrusted to him, and in fact [had] misled both [the appellant's attorney] and the clients he assisted as to what he had done."** The appellant's attorney continued thus in the same paragraph:

> **"On two occasions, [Advocate Nel] had settled matters without a mandate, and in one of these occasions, [the appellant's attorney's firm] as a result had to step in and pay the settlement amount. In addition, [Advocate Nel] has also on two occasions acted without a mandate in two matters in the Cape Town Labour Court, resulting [in] a scathing attack by the Court on [the appellant's attorneys firm]…".**

In the next paragraph of the affidavit the appellant's attorney relates an incident which he says occurred in May 2002. He says that Advocate Nel tried to mislead the Court **"where he had been entrusted to bring a review application, did not file the application, and then again unsuccessfully tried to settle the matter without a mandate. As a result and in open court, Adv**

Nel tried to mislead the Court relating to actions that he took and, in a subsequent judgement, the Honourable Judge Francis severely criticised Adv Nel and due to the fact that we purportedly briefed him, also [ourselves].”

[11] It is clear from those parts of the appellant’s attorney’s affidavit referred to above that as early as May 2002 the appellant’s attorney became aware of instances where Advocate Nel had neglected his duties in regard to matters that had been entrusted to him or in respect of which he had, I assume, been briefed. Indeed, the appellant’s attorney was aware at that time that Advocate Nel had misled him and his clients. Yet, he did not examine all matters that had been entrusted to Advocate Nel to determine whether the latter had carried out his instructions in regard to all matters that had been entrusted to him in which he had been briefed. The appellant’s attorney fails to explain why he did not do this. A period of about three months, that is May, June and July, lapsed before he discovered the file relating to this matter. That delay in finding out, apparently by mere coincidence, whether Advocate Nel had carried out his instructions in regard to this matter is not explained.

[12] Furthermore, to the extent that the appellant’s attorney may be saying that he had briefed Advocate Nel to prepare an answering affidavit in this matter, it was his duty to have monitored Advocate Nel. That is what an attorney is supposed to do when he has briefed an advocate in a matter. He informs the advocate when the brief must be back in order to ensure compliance with whatever time limits may apply. He diarises that date and, if the brief is not back

by that date, he contacts the advocate. He does not brief an advocate and then forgets about the matter and leave everything to the advocate. Accordingly, if the appellant's attorney had given Advocate Nel a brief, which is what he should have done, he should have diarised the matter so as to contact Advocate Nel if the brief was not returned on time but also so that, if need be, he could ask the respondent's attorney for an extension of time, if this became necessary. If he had dealt with the matter in this manner, he would have delivered the answering affidavit on time or if there was a delay, it would have been a slight delay. If the appellant's attorney had handed the matter correctly, he would have told Adv Nel the date by when the affidavit was required to be delivered to Court and, if Advocate Nel did not return the brief on time, he would call him. If the appellant's attorney gave Advocate Nel work without briefing him, that would have been an unacceptable way of an attorney giving work to an advocate and Advocate Nel is not supposed to have accepted such work without a brief.

[13] Furthermore, once Advocate Nel had prepared the answering affidavit, he would have returned the brief to the appellant's attorney whose responsibility it would have been to deliver the answering affidavit to the Registrar and to serve it on the respondent's attorney. The appellant's attorney says nothing in his affidavit about any of this and does not explain how it would have been possible for the answering affidavit to have been delivered to Court by an advocate instead of an attorney or his staff. Nor does he explain how Advocate Nel, being an advocate, could have had direct communication with the client without his knowledge or intervention.

[14] It seems to me that the truth of the matter is that the appellant's attorney as the attorney who should have monitored the progress of the file in this matter should take equal, if not greater, blame for the fact that the appellant's answering affidavit was not delivered on time. Even, after he had discovered the sec 158(1)(c) application on 22 July 2002, he still took him about a month to deliver the answering affidavit and there is no explanation tendered as to why it took him a whole month after the 22nd July to ensure delivery of such affidavit to Court.

[15] There is no doubt in my mind that the appellant's attorney handled his client's matter herein in a most unsatisfactory manner with the result that the Court a quo, quite correctly, dismissed the application for condonation and disregarded the defence raised in the appellant's answering affidavit. It seems to me that the affidavits and annexures thereto in this matter should be furnished to the Law Society having jurisdiction over the appellant's attorney as well as to the General Council of the Bar in order to enable those bodies to study how Adv. Nel and the appellant's attorney conducted themselves and determine whether Advocate Nel's and the appellant's attorney's conduct in the matter was not such that consideration should be given to taking some disciplinary action against them.

[16] In the light of all of the above circumstances I am satisfied that the order of the Labour Court was right and the appeal had absolutely no merit. It was for these reasons that on the day of the hearing of this appeal we had no hesitation in making the order that we made

dismissing the appeal with costs. The appellant and its attorney must count themselves lucky that we did not order that the costs be as between attorney and client.

Zondo JP

I agree.

Davis AJA

I agree.

Jappie AJA

Appearances:

For the respondent	:	Advocate Nel
Instructed by	:	Cheadle Thompson & Haysom
For the appellant	:	Mr Snyman
Instructed by	:	Snyman Van Der Heever Heyns