

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT DURBAN

CASE NO: D 293/04

In the matter between:

**NTOKOZO ARCHIBALD KHANYILE**

Applicant

and

**BILLITON ALUMINIUM SA LTD t/a HILLSIDE ALUMINIUM**

Respondent

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### JUDGMENT

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1. This is an application for leave to appeal against my judgment of 10 April 2006, coupled with an application for condonation.
2. The Applicant (and would-be Appellant, who was the Third Respondent in the court *a quo*), seeks leave to appeal against paragraphs 23.3 and 23.3 of the Judgment. In these paragraphs, I ruled that:
  - 2.1 The Applicant [the company] is ordered to pay the third Respondent [Khanyile] compensation equivalent to twelve months' remuneration, amounting to R163,500.00. Payment is to be made within fourteen days of this judgment.
  - 2.2 There is no order as to costs.
3. Khanyile seeks leave to appeal on the following grounds:
  - 3.1 That I erred in setting aside the decision of the CCMA Commissioner inasmuch as there was "no legal ground whatsoever" for so doing.
  - 3.2 That I erred in finding that reinstatement was not the appropriate remedy, inasmuch as there was "no evidence whatsoever" to indicate that a continued employment relationship between the Appellant and the Respondent would be intolerable. (Paragraphs 1 and 2 of the application for leave to appeal).

4. The applicant also seeks leave to appeal against the costs order.
5. Judgment was handed down on 10 April 2006. The application for leave to appeal was filed on 22 June 2006, some one-and-a-half months out of time. I will deal with the application for condonation first.

#### APPLICATION FOR CONDONATION

6. Judgment was handed down on 10 April 2006. In terms of rule 30(2) of the Labour Court Rules, application for leave to appeal had to be made and the grounds for appeal furnished within 15 days of the date of the judgment. In the rules, "day" is defined as any day other than a Saturday, Sunday or public holiday. Taking into account the many public holidays in April and May, the *dies* expired on 5 May 2006. The application is thus some 33 court days, or one-and-a-half months, out of time.
7. The test for the granting on condonation is well known, and is best set out in *Melane vs Santam Insurance Co Ltd* 1962 (4) SA531 (A). In that case, the then Appellate Division held that the following factors need to be considered:
  - 7.1 The degree of lateness;
  - 7.2 The explanation given for the lateness;
  - 7.3 The prospects of success; and
  - 7.4 The importance of the matter.
8. This court has referred with approval to the dictum in *National Union of Mineworkers and others vs Western Holdings Gold Mining* (1994) 15 ILJ 610 (LAC) at 613B-E that these factors are inter-related. They are not individually decisive. What is needed is an objective conspectus of all the facts. [See, for example, *Mansoor vs CCMA & others* [2001] BLLR 79 (LC) at 84].

#### THE DEGREE OF LATENESS

9. The rules require the Applicant to file his application for leave to appeal within 15 days. He has taken three times as long. This is a lengthy delay that has to be weighed up against the other factors.

#### THE EXPLANATION GIVEN FOR THE LATENESS

10. Khanyile explains that his attorneys demanded payment of his outstanding fees and a further deposit before considering his request to apply for leave to appeal. Whilst I have sympathy with his dilemma, the application was a simple

and straightforward one, as the Respondent has pointed out. Khanylle states under oath that he consulted his attorneys on 18 April 2006. They should have advised him of the applicable time periods. He gives no explanation why, or indeed if, he approached anyone on a pro bono or pro amico basis to assist him in drafting the simple application for leave to appeal within the requisite time periods. Nevertheless, his explanation still has to be weighed up against the important factor of the prospects of success.

#### THE PROSPECTS OF SUCCESS

11. In considering the prospects of success on the application for leave to appeal, I have to consider also whether there are reasonable prospects that another court will come to a different conclusion.
12. I found that Khanylle's insistence (at the disciplinary enquiry) that he would continue to repeat his actions, despite the fact that he was aware of the rule in question and that it had been brought to his attention after the first transgression, points to a breakdown in the trust relationship between him and the company. This is all the more so where he was employed in a relationship of trust as a supervisor (paragraph 20 of the judgment).
13. As I set out in paragraph 21 of the judgment, it appears from the arbitration award that the Commissioner did not apply his mind to the question whether reinstatement was the appropriate remedy.
14. In terms of section 193(2) of the Act<sup>1</sup>, the Labour Court must require the employer to reinstate or re-employ the employee if the dismissal was unfair, unless one of four factors is present. Conversely, in terms of section 193(2)(b), the court should not require the employer to reinstate if the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable.
15. In the present case, I found that a continued employment relationship would clearly be intolerable. The employee, Khanylle, was aware of the rule relating to confidential information. At the time of the disciplinary hearing, he had been reminded of the rule and he had flouted it again, after the first incident. Nevertheless, he insisted at the disciplinary enquiry that he would repeat his actions, stating in so many words that, "if the need arises in the future, I will continue to disclose information ..."

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<sup>1</sup> Labour Relations Act 66 of 1995

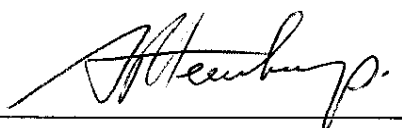
16. I do not agree that there are reasonable prospects that another court would come to a different conclusion on this point.
17. Similarly, another court is unlikely to interfere with my award on those aspects where I exercised my discretion, ie with regard to compensation and costs.
18. In any event, it ill behoves the applicant to now seek leave to appeal against the costs order, when both parties asked for costs to follow the result when they argued the matter *a quo*.

#### THE IMPORTANCE OF THE MATTER

19. There is no doubt that this matter is of importance to Khanyile. However, that must be weighed up against the further delay and resultant disruption to the company, should condonation be granted; and Khanyile's poor prospects of success.

#### CONCLUSION

20. On a conspectus of all the facts, I do not consider the Applicant's prospects of success to be sufficiently strong to outweigh the extent of the delay in filing this application. Even if the application for condonation were to be granted, I would not grant the application for leave to appeal, as another court is not likely to come to a different conclusion on the merits.
21. Khanyile states under oath that he is still unemployed. I take that factor into account in deciding whether to make a costs order, based on considerations of law and fairness, in this application.
22. The application for condonation is dismissed. There is no order as to costs.

  
Steenkamp, AJ

Acting Judge of the Labour Court

Date of judgment: 24 August 2006

For Applicant: Z E Buthelezi, Buthelezi Attorneys

For Respondent: B McGregor, Deneys Reitz Attorneys