IN THE LABOUR APPEAL COURT OF LESOTHO
HELD AT MASERU

Case No. : LAC/A/02/2011

In the matter between:

STANDARD BANK LESOTHO Appellant

and

MANTSOAKI MALAKANE Respondent

CORAM: C.J. MUSI, AJA

ASSESSORS: MR L. MATELA
MRS L. RAMASHAMOLE

HEARD ON: 14 JUNE 2013

DELIVERED ON: 25 JUNE2013

JUDGMENT BY: C.J. MUSI, AJA

INTRODUCTION

[1] This is an appeal against the whole judgment of the Labour Court.

BACKGROUND

[2] The respondent was employed by the appellant from 20 March 1995 until 20 February 2006 when she was dismissed

for misconduct, after a disciplinary hearing was held. She unsuccessfully challenged her dismissal at the Directorate for Dispute Prevention and Resolution (DDPR). She then launched a review application in the Labour Court. The Labour Court reviewed and set aside the award of the arbitrator and ordered the respondent's reinstatement. The appellant appealed to this Court against the decision of the Labour Court.

FACTS

[3] The respondent was employed by the appellant as a team leader or supervisor in charge of tellers. On 19 January 2006 a member of the appellant's internal audit department, Mr Tlai-Tlai, was informed that the respondent had taken M15,800.00 from her till for personal use. Tlai-Tlai sent Mr Lekhooa Pitso to conduct a snap check to ascertain whether the respondent's cash holdings were balancing. He found that her cash holdings were balancing with her computer records.

[4] After another tip-off they checked the respondent's cash again and found that there was a shortfall of M15,800.00. Pitso also discovered that the respondent had transferred M15,800.00 to another teller, Mr Tjabaka and that Tjabaka transferred the same amount back to the respondent. Tjabaka's cash holdings were also checked and found to be balancing. When the books were finally checked, the respondent's books balanced.

[5] The evidence established that the appellant's internal procedures were not followed. The procedure being that for every inter-teller transfer of funds an inter-teller slip showing the cash transferred with the denomination of such cash specified, must be completed by the teller doing the transfer. No such slips were completed by the respondent and Tjabaka.

[6] The respondent denied misappropriating any funds.

[7] Mr Tjabaka did not testify during the arbitration proceedings, but an unsworn statement, purportedly made by him, was handed in.

[8] The DDPR arbitrator accepted the statement and verbal statements made to Tlai-Tlai by Tjabaka. Tlai-Tlai also speculated that the books ultimately balanced, because the respondent found cash somewhere and replaced the M15,800.00 which she took. The arbitrator found that the respondent's dismissal was fair.

LABOUR COURT

[9] The Labour Court found that Mr Manamolela, the Human Resources Manager of the appellant, who deposed to the answering affidavit in that Court did not state that he had the necessary authority to defend the proceedings on behalf of the appellant. The Court *a quo* also found that the arbitrator irregularly admitted hearsay and speculative evidence. The

Court *a quo* found that the respondent's dismissal was unfair. It set aside the arbitrator's award and ordered the respondent's reinstatement. The Labour Court delivered its judgment on 12 November 2010.

[10] The notice of appeal was filed on 28 January 2011. In terms of Rule 5(1) such notice of appeal must be filed within 6 (six) weeks of the judgment of the Labour Court. The notice of appeal was filed out of time. The appellant filed an application for the condonation of the late filing of its notice of appeal. The condonation application was strenuously opposed.

[11] Mr Koto, on behalf of the appellant, argued that the delay is not inordinately long and that it was properly explained. Although he initially argued that the prospects of success are good, he grudgingly conceded that there was no evidence that Mr Manamolela had the requisite authority to defend the review proceedings.

[12] Mr Shale, on behalf of the respondent, argued that there was no proper explanation for the delay and that the appellant only explained two of the three week's delay and not the entire period. He further pointed out that the condonation application was filed on 31 May 2012 – approximately 16 (sixteen) months after the notice of appeal was filed. No explanation was given for the delay in launching the condonation application.

[13] Dismissal causes untold hardship and suffering to employees. The effects thereof are in most cases not only felt by the individual employee, but also by his/her family, extended and/or immediate. Where a dismissal is challenged, like in this case, the employer is also mutually affected, because it may not fill the position of the employee permanently pending the outcome of the matter. It is also in the interest of justice that labour disputes be resolved swiftly. All the parties involved desire finality so that they can go on with their affairs and life.

[14] In **Queenstown Fuel Distributors CC v Labuschagne N.O. and Others** (2002) 21 ILJ 166 (LAC) at paragraph [25] the South African Labour Appeal Court said the following:

> "By adopting a policy of strict scrutiny of condonation applications in individual dismissal cases I think that the Labour Court would give effect to the intention of the legislature to swiftly resolve individual dismissal disputes by means of a restricted procedure."

I agree. This Court too should adopt a restricted procedure.

[15] Condonation is not there for the taking. It is an indulgence that is granted on good cause shown if the court considers it to be in the interest of justice to grant condonation. The court therefore has a discretion which it must exercise judicially.

[16] In the well-known and often quoted case of **Melane v Santam Insurance Company Ltd** 1962 (4) SA 531 (AD) at 532B – E the principles applicable, in the exercise of the discretion to grant or refuse condonation were enunciated as follows:

> "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 therefore, 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."

[17] It must however be remembered that in the absence of an acceptable explanation or where there is no explanation at all, for material or significant delays, an application for condonation should not be granted irrespective of the

prospects of success on the merits. What is not explained or unacceptably explained cannot be condoned.

See **Chetty v Law Society, Transvaal** 1985 (2) SA 756 (A) at 768B – C; **Moila v Shai NO and Others** [2007] 28 ILJ 1028 (LAC) at paras [35] – [37]; **Waverley Blankets Ltd v Ndima and Others, Waverley Blankets Ltd v Sithukuza & Others** (1999) 20 ILJ 2564 (LAC) at para [11].

[18] The appellant's reasons for the delay are captured in paragraph 8 of the founding affidavit deposed to by Morathane Monyamane, on behalf of the appellant. I reproduce it without emendation.

> "a) The delay is noting the appeal was caused by the fact that there was a delay in communication between the bank and our first attorney of record such that three weeks had gone by when we were advised of our prospects of success should we wish to appeal. We then resolved to approach our present attorneys for advice and we were informed that we ought to have noted our appeal not later that 24th December 2010. We were, however, advised that on good cause shown the Court can condone the late noting of the appeal.
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> b) Immediately after the judgment Mr Lehlohonolo Lethbane, Manamolela is my predecessor was away from the workplace for a period of two weeks. During his absence there was no one acting in my position. He had been the only one who was conversant with the case since he had represented the bank throughout all the proceedings at both the DDPR and the Labour Court. He was therefore the only person better placed to advise the

> Bank about the case. Had he been present he would have interacted with our first attorney of record about the possibility of noting an appeal against the judgment of the Labour Court. No one could do this in his absence, especially when no one was holding fort for him. He has since left the Appellant's employ and was not willing to cooperate with Appellant because of the circumstances leading to his departure."

[19] The appellant must explain the delay in filing the notice of appeal after 24 December 2010. The appellant had a duty to explain to us why it did not file the notice of appeal on or before 24 December 2010 and why it only filed it on 28 January 2011 and not earlier. The appellant did not state how long the delay in communication between it and its erstwhile attorneys took. According to the appellant, three weeks had gone by before it was advised of its prospects of success. It did not explain whether the three weeks were from the date of the judgment of the Labour Court or from the 24th December 2010 or any other date. The appellant did not state when it engaged its current attorneys or when it was advised by its current attorneys that it should have filed its notice of appeal on or before 24 December 2010.

[20] The appellant stated that its employee, Mr Manamolela, was away from the workplace for two weeks "immediately after the judgment". It did not explain why the notice of appeal could not be filed after Manamolela's return. Even if we accept that Manamolela was away for two weeks after the judgment was delivered, there was still a period of four

weeks within which the notice of appeal could have been filed within the prescribed time limits. It is clear that the appellant's explanation for the delay is totally inadequate and unacceptable.

[21] The appellant's careless attitude did not end there. It took approximately sixteen months after noting the appeal to apply for condonation. It did not explain why the application for condonation was not launched simultaneously with the filing of the notice of appeal.

[22] The appellant filed its heads of argument on 3 June 2013. These heads of argument did not address the condonation issue and they were way out of time. In terms of Rule 11(1) the appellant was supposed to file its heads of argument 14 days before the hearing with the Registrar. The matter was set down for 13 June 2013. On 13 June 2013 the appellant requested a postponement to file heads of argument on the condonation application. The matter was postponed to 14 June 2013 for that purpose. It is clear that the appellant did not prosecute this matter diligently. It caused this matter to drag on for an inordinately long time.

[23] Mr Koto's concession that the prospects of success on the merits are dim, because there was no evidence that the person who filed the answering affidavit had the necessary authority to do so, is a further reason why the application for condonation should not be granted.

[24] The concession was correctly made. In the current respondent's replying affidavit in the Labour Court she specifically challenged Manamolela's authority to oppose the review application on behalf of the appellant. The appellant did not endeavour to show that he had the necessary authority. Manamolela did not need any authority to depose to an affidavit. What he needed from the appellant was authorisation to oppose the proceedings on behalf of the appellant. See **Ganes and Another v Telecom Namibia Ltd** 2004 (3) SA 615 (SCA) at paragraph [19].

[25] There is no reason why the costs should not follow the success in this matter, especially in the light of the manner in which this appeal was prosecuted.

[26] Accordingly the following order is made:

The application for condonation is dismissed with costs.

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C.J. MUSI, AJA

I agree.

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MR. MATELA

I agree.

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MRS RAMASHAMOLE

APPEARANCES:

For the appellant:	Adv Koto
Instructed by:	T. Maieane Attorneys
For the respondent:	Adv Shale
Instructed by:	K.M.T. Thabane

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