IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

Reportable

HELD AT JOHANNESBURG **CASE NO: DA 11/03**

IN THE MATTER BETWEEN

SIPHO EMMANUEL MGOBHOZI **APPELLANT**

AND

RAJAH NAIDOO ARBITRATOR **FIRST RESPONDENT**

DURBAN METROPOLITAN BARGAINING COUNCIL **SECOND RESPONDENT**

DURBAN METROPOLITAN COUNCIL (HOUSING) **THIRD RESPONDENT**

JUDGMENT

NICHOLSON JA

1. The appellant was employed by the third respondent as a junior clerk in the Administration Office at the Glebelands Hostel in Durban. He was responsible for writing down complaints received from the public. He would in the course of his duties complete the complaint form and job card and he obtained authorization for the repairs to be effected. He was also responsible for inspecting all the work done by the contractors and

certifying that the work had been completed. After that process the council would pay the contractor in question.

2. He was dismissed on 4 April 2000 after an internal disciplinary enquiry had found him guilty of various acts of dishonesty. His internal appeal was dismissed on 13 June 2000. The arbitration award he sought to have set aside and reviewed was issued on 9 December 2000 by a commissioner of the Commission for Conciliation, Mediation and Arbitration ('the CCMA'), in terms of section 33 of the Arbitration Act 42 of 1965 and/or the Labour Relations Act, No 66 of 1995 ('the Act').

3. The review was served on the third respondent on 24 August 2001 some 31 weeks out of time. The rules provide him with six weeks within which to review the arbitration award.

4. In his application for condonation for the late review of the commissioner's award the appellant states that at the end of November 2000 he observed that his headaches were no longer responding to pain tablets from the shops. He then approached a doctor Dr GC Naidu who issued a medical certificate certifying that the appellant was treated for 'depression, headaches, anxiety, loss of job/income/family responsibility/financial burden, sane automatism, mentally disturbed, stress and heavily depressed.'

5. The certificate verifies that he was treated from 11 December 2000 to 6 June 2001. On each occasion of his six visits he was given the same medication namely Aropax x 20, Propain forte x20 and Flunitrazepan. Dr Naidu concludes the medical certificate with the comment that the appellant has become suicidal as a result of his symptoms.

6. The appellant has filed a further medical certificate from Dr S Khalil Kader a specialist psychiatrist, who confirms that the appellant was referred to him by Dr Naidu 'who has been treating him for stress and depression allegedly due to work related stress.' Dr Kader advises that the appellant 'continue on Aropax and now replace Flunitrazepan with Tydamine 50 ml at 8 pm. He is advised to continue on medication and have monthly reviews.'

7. In his founding affidavit the appellant states that he did not file his review on time because of the illness 'as evidenced by the medical report.' He then goes on to attack the arbitration award on the merits.

8. The application for review was opposed by the third respondent who filed an opposing affidavit by the Director of Housing, Central Operational and City, in which she joins issue with appellant on the seriousness of his condition. She contests the appellant's allegations and avers that the

certificates filed by appellant should not be accepted or admissible in the court a quo by reason of various factual and legal issues, including the following:

a. The fact that the same diagnosis and medication is prescribed on each monthly visit
b. That Dr Kader the Specialist Psychiatrist saw the appellant only once on 14 July 2001
c. The fact that appellant's condition was not serious enough to warrant being seen by a specialist only in July 2001 and that 'no harm appears to have befallen the appellant during the entire period of his illness.'
d. That neither of the doctors say that the appellant 'was incapable of prosecuting the review application'. The third respondent states that such fact is fatal to the appellant's application for condonation.
e. The submission is also made that the appellant's 'excuse for non-compliance is not compelling'.

9. In reply the appellant alleges that the third respondent cannot cast an opinion on the medical practitioner's treatment of the appellant. The reference to Dr Kader was done in the exercise of Dr Naidu's professional duties and as an expert in that field.

10. Needless to say the appellant does not file affidavits by the doctors at any stage but merely states that 'the appellant had visited the doctors in search for medical treatment as its (sic) personal and mental faculties demanded so. The appellant had not visited the doctors because of its (sic) incapability of prosecuting the reviewed (sic) application.'

11. The Labour Court threw out the application for condonation for the late filing of the review application as 'neither doctor expressed any opinion on the competence of the appellant to manage his affairs' The court went on to say that neither the appellant or his legal representative Mr Jafta, nor indeed the court, was competent to draw the inference that the appellant was not competent to launch the application timeously, nor does the appellant say when and how he became competent to launch the application when he did. The court consequently found his explanation wholly inadequate. The application for review was also dismissed on the grounds that it had no prospects of success on the merits.

12. Mr Pillay, who appeared for the third respondent, has submitted that the appellant ought to have filed affidavits by the doctors in question and that the certificates were of questionable admissibility.

13. In order to determine the admissibility of the medical certificates put up by the appellant in the Labour Court, it is necessary to ascertain the status of the Labour Court and what rules of evidence are applicable.

14. Section 151 deals with the establishment and status of Labour Court and speaks of it as a court of law and equity. It is clear that the description of the Labour Court as a court of equity was introduced by section 11 of Act 127 of 1998.

15. This Court has commented on the significance and effects of this provision. In *3M SA (Pty) Ltd v SACCAWU & Others* [2001] 5 BLLR 483 (LAC) at paragraph [17] Zondo AJP as he then was held

> 'In fact the description of the Labour Court and this Court as courts of equity does not add anything to the jurisdiction of these two courts. These two courts are superior Courts of law. The only fairness that they apply in dealing with matters which come before them is such fairness as they are specifically required to apply in specific sections of the Act in respect of specific types of disputes as well as such fairness as every Court of law is required to observe in terms of the rules of natural justice. Examples of such sections are 185, 187, 188, 191, 192(2), 193, 194 and 162(1). Save for section 162(1), all these sections relate to unfair dismissal disputes. Section 162(1) relates to orders of costs and obliges the Labour Court to have regard to the requirements of law and fairness in deciding whether to award costs. In fact the reference in the Act to the Labour Court and this Court as courts of equity (in addition to being courts of law) should be repealed because, while it adds nothing, it may cause unwarranted confusion. The court a quo was not required to have regard to general considerations of fairness extraneous to the Act in adjudicating the second and further respondents' claim.'

16. I am of the view that the fact that the Labour Court is enjoined to deal with fairness in the context of a fair dismissal and the existence of a fair reason and fair procedure does not mean that the Labour Court has a general equitable jurisdiction with regard to the admissibility of evidence.

17. As clearly enunciated in the above-cited case sub-section (2) provides that the Labour Court is a 'superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of a provincial division of the Supreme Court has in relation to the matters under its jurisdiction.' Sub-section (3) provides that the Labour Court is a court of record.

18. The effect of describing the Labour Court as a 'superior court' is clearly intended to put beyond any doubt the status of that court. One should bear in mind that its predecessor the Industrial Court was not a court of law. In addition the provisions of section 151 (2) give the Labour Court the 'authority, inherent powers and standing' equal to the High Court. It is therefore clear that the rules relating to the admissibility of evidence in the Labour Court and indeed in this Court are the same as those that pertain in the High Court and the Supreme Court of Appeal.

19. Rule 7A provides for how reviews are to be brought in the Labour Court and requires a notice of motion to be supported by an affidavit setting out

the factual and legal grounds upon which the appellant relies to have the decision or proceedings corrected or set aside.

20. The affidavits filed by parties in review proceedings have to set out all the evidence which would have been led at a trial of the matter. See *Hart v Pinetown Drive-in Cinema (Pty) Ltd* 1972 (1) SA 464 (D) at 469 C-E. The evidence provided by the two certificates was not in the form of affidavits and was hearsay evidence.

21. In order to determine whether it was admissible it was necessary to look at section 3 of the Evidence Amendment Act 45 if 1988 ('the Evidence Act') which provides as follows:

> (1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –
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> (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;
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> (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or
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> (c) the court, having regard to -
>
> (i) the nature of the proceedings;
> (ii) the nature of the evidence;
> (iii) the purpose for which the evidence is tendered;
> (iv) the probative value of the evidence;
> (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;

(vi) any prejudice to a party which the admission of such evidence might entail; and
(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.

(2) Hearsay evidence may be provisionally admitted in terms of subsection (1)(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

(4) For the purposes to this section -

"hearsay evidence' means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;
"party' means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.'

22. Section 3(4) above makes it clear that hearsay evidence includes that given in writing by a person other than the person deposing to the affidavit that includes the evidence in question. The fact that the appellant on oath in an affidavit refers to the medical certificates of other witnesses does not rescue such affidavit from the stigma of hearsay. There obviously have to be affidavits from the doctors in question themselves.

23. In order to determine whether the evidence of the doctors' certificates and the opinions they provide therein should be admissible in evidence in the

application for review the Labour Court had to take into account the provisions of section 3 (1) (c) of the Evidence Act and the factors enumerated therein.

24. The first factor in the said sub-section requires the court to consider the nature of the proceedings – in this instance an application for condonation for the late filing of review proceedings. In considering the nature of the evidence the court should bear in mind that it relates to the expert evidence of two doctors relating to the condition of the appellant. Generally speaking opinion evidence cannot be given by laymen and is the preserve of persons specifically qualified and trained in a particular field – often described as experts.

25. In fields as esoteric as the workings of the mind and the effects on daily life – more especially the ability to instruct attorneys or bring proceedings on one's own – the courts are reliant upon the views of the medical profession. In this context psychologists and psychiatrists usually provide the evidential material necessary for the court to decide the issue. For the appellant to convince the Labour Court that he was mentally and/or physically incapable of bringing proceedings in that forum he had to have the evidence of such professionals.

26. The Evidence Act requires the court to consider the reason why the medical evidence was not provided in the form of affidavits. No reasons are given why no affidavits have been provided. It is not suggested that the doctors have passed away, have emigrated or are unavailable for some other cogent reason.

27. The absence of any such explanation is viewed in a most serious light. The cynic might observe that medical certificates are available for anyone paying the appropriate fee. If perceptions of the abuse of medical certificates are widespread – as I believe they are – it strengthens the need for courts to be especially vigilant against their misuse. One inference to be drawn in this application is that the medical practitioners were not prepared to go on oath to defend their certificates. Another is that they were not prepared to spare the time to explain their very truncated and laconic comments.

28. The absence of affidavits from the doctors means that the court is deprived of any elaboration of the widely and vaguely stated symptoms attributed to the appellant. The nature of the medication and the efficacy thereof is also not explained.

29. The Evidence Act speaks of prejudice to the third respondent. The latter has had no opportunity of having the appellant examined by its own

practitioners and has had to rely on the vague allegations in the certificates. I cite but one example namely that the appellant is alleged to have suffered from sane automatism for seven months. Even the most cursory research into the law reports on the topic of sane automatism and its use as a defence in criminal proceedings would reveal that it is a complex condition, requiring the assistance to the court of specialist psychiatrists, with a special interest in the field. For it to continue for seven months seems most incongruous. But that was for the appellant to explain to the Labour Court in acceptable fashion via affidavits from psychiatrists, not for the Labour Court or this Court to speculate.

30. Although the Labour Court did not decide the issue of admissibility and merely determined the application on an acceptance of the certificates at face value, I believe it ought to have done so. I do not believe that it ought to have exercised its discretion to consider the certificates at all, in the absence of affidavits by the medical practitioners in question. For that reason alone the appeal must fail.

31. The court is also enjoined by the Evidence Act to consider the probative value of the hearsay evidence. At some levels the second enquiry posited above: namely whether the appellant showed that he was so incapacitated by his ailments that he could not bring the review proceedings timeously, falls to be considered under this factor.

32. In order for the appellant to succeed the certificates of the doctors had to show that each such practitioner had such an opinion and the grounds for stating that conclusion.

33. Not only do the medical practitioners not say anything remotely approaching that view at any stage, they say very little to enable a court to infer that from the facts they provide. I have set out the full extent of their very brief and vague comments in the certificates. A fair reading of those does not provide the sort of material to warrant the drawing of any inferences let alone the inference that the appellant's incapacity to bring proceedings, through a legal practitioner or on his own, was the most plausible one.

34. I am therefore of the view that the explanation was grossly inadequate and for that reason the appeal must fail. There is plenty of authority that where the explanation for the delay is unacceptable the prospects of success are irrelevant. *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 768B-C. *A Hardrodt (SA) (Pty) Ltd v Behardien and Others* (2002) 23 ILJ 1229 (LAC) at 1233. There is no reason to consider the prospects of success of the appeal.

35. In the result the appeal is dismissed with costs.

NICHOLSON JA

Mc CALL AJA

COMRIE AJA

Appearances:

For the Appellant: Jafta and Company.

For the Third Respondent: I. Pillay instructed by Messrs Dehal International.

Date of argument: 23 August 2005

Date of judgment: 18 November 2005