IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN DURBAN

CASE NO D111/01

16 MAY 2008

IN THE MATTER BETWEEN:

FRANCOIS HANEKOM	Applicant
and	
PAT STONE N.O	First Respondent
COMMISSION FR CONCILIATION, MEDIATION AND ARBITRATION	Second Respondent
SOUTH AFRICAN POST OFFICE	Third Respondent

JUDGMENT

PILLAY D, J This application for review is prefaced by an application for condonation for the late filing of the record. The applicant employee contended that the application for condonation was not necessary as the rules impose no time limit to file his record. A six year delay in filing the record is, in the opinion of the Court, extraordinary and does call for an application for condonation. The Court considers the prospects of success on the merits before turning to other aspects of the condonation application.

The first respondent arbitrator confirmed the dismissal of the applicant/employee on the singular issue of his dishonesty. The background to the misconduct proceedings against the employee was that he had obtained permission from the third respondent employer to do private remunerative work. In his motivation to do such work, dated 11 September 2005, the employee had submitted that he would spend about two hours on

Saturday mornings and that that would not impair his productivity in relation to his work for the employer. In an earlier motivation dated 10 May 1995, the employee had said that as a psychologist, the private work helped him keep up with developments in the field. He also assured the employer that the employer was not involved in any way. (Page 21 of the exhibits bundle).

After investigating his submission, the employer granted permission by a letter dated 10 September 1996 on the basis of the employee's 1995 motivation. A material condition of the permission was that the employee would firstly, adhere to the employer's policy on remunerative outside work and secondly, that the outside work would not affect the normal office work. (Page 19 of the exhibits bundle).

A material term of the policy was that employees had to declare their interest in outside work "immediately and in writing". The policy further states:

> "It should be made abundantly clear to each and every employee that in the event of it becoming known at a later date that he/she failed to make use of this opportunity to declare his/her interest in the mentioned activities, severe disciplinary action – which does not exclude dismissal – will be taken against him/her. In view of the importance of this matter, it is suggested that each employee should acknowledge in writing (on the back of a copy of this memo) that he/she is

aware of the requirements."

The employer notified the employees of this policy on 19 May 1005.

The employee was charged as follows:

1. Misappropriation of the employer's stationery, other equipment, including its psychometric testing material;

Abuse of his position as manager to instruct or allow junior employees to do private work for his account during official working hours; and

Instructing, alternatively allowing a junior employee to misappropriate devices of the employer, including its licensed psychometric testing materials for his financial gain.

The common cause evidence was that:

1. the employee used the employer's equipment for private remunerative work;

the employee used another employee to assist him in such private work;

that employee did some of the private work during normal working time.

The arbitrator discounted this evidence which proved the charges. Instead, he honed in on the dishonesty of the employee for failing to disclose fully his interest in outside work. (Page 23 of the pleadings bundle). This reasoning is unassailable.

In so far as I may be wrong, and in so far as it is necessary to consider the other aspects of the application for condonation, I turn to consider firstly, the delay in filing the record. The award was issued on 26 November 2000. The record was filed six years later. This is an extraordinary period of delay. Furthermore, the review is being considered more than seven years after the award was issued and almost eight years

after the employee was dismissed. The employee did not do enough and certainly did not act expeditiously to ensure that the record was compiled and filed timeously. While a respondent party to a review has a duty to co-operate in compiling the record, the *onus* always remains on an applicant for review to ensure that a proper record is delivered. In this case it is hardly open to the employee to assert that the employer cannot rely on prejudice because of the delay as it did not compel the employee to deliver the record, especially when the employee itself did nothing to compel the Commissioner to deliver the record.

The explanations for the delay, namely the difficulties in locating the arbitrator and compiling the record are unacceptable. The delay of seven years is excessive. The employer will be prejudiced if this matter were to be returned for rehearing.

THE APPLICATION FOR REVIEW IS DISMISSED WITH COSTS.

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Pillay D, J

Date Edited: 4 August 2008

APPEARANCES

For the Applicant: Adv L Naidoo

Irvin Lawrence c/o Garlicke & Bousfield

For the Respondent: Attorney H Schensema