REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 918/11

In the matter between:

SANPARKS **Applicant**

and

CCMA **First Respondent**

DAVID WILSON N.O. **Second Respondent**

ALFRED NEMAHUNGUNI **Third Respondent**

Heard: **13 June 2013**

Delivered: **24 July 2013**

Summary: Review – misconduct – condonation – late filing of record – rule 7A considered. Condonation granted but review dismissed on merits.

JUDGMENT

STEENKAMP J

Introduction

[1] The employee, Mr Alfred Nemahunguni (the third respondent) was dismissed by the applicant, South African National Parks (Sanparks). He referred an unfair dismissal dispute to the CCMA (the first respondent). The commissioner (the second respondent) found that the dismissal was substantively unfair and ordered Sanparks to reinstate the employee from 21 November 2011 for the balance of his fixed term contract to 31 March 2013. The commissioner limited backpay to 8 months. Sanparks wishes to have that award reviewed and set aside.

[2] The record was filed about six months late. Sanparks applied for condonation. The employee also applied for condonation for the late filing of his answering affidavit. The employee further takes issue with the authority of the deponent to the founding affidavit, Ms Hawa Khan, to act on behalf of Sanparks. Before dealing with those preliminary points, I shall sketch the background to the application.

Background facts

[3] The employee was employed on a fixed term contract from 1 April 2008 to 31 March 2013 as a project manager for the Table Mountain National Park.

[4] On 17 June 2010 the employee suffered what appeared to have been an epileptic seizure while he was at work. The next day his superior, Mr Carlo de Kock, instructed him not to drive Sanparks vehicles. The employee is hearing impaired and needs to lip read or use writing in order to communicate. De Kock therefore wrote the instruction on a piece of paper and then threw it away.

[5] On three occasions just over a month later, the employee again drove a Sanparks vehicle (on 23 and 26 July and 13 August 2010). On 8 September 2010 he was called to a disciplinary hearing arising from those incidents and relating to his driving a Sanparks vehicle and the purposes for which it was used. The alleged misconduct was described as follows:

"1. **Insubordination/refusal to carry out valid or reasonable orders**:

Instruction was given by Carlo de Kock Assistant Cluster Manager to Alfred on 18 June 2010 that is not allowed to drive the project vehicles or go into field on his own due to him suffering from epilepsy and due to the fact that he had an epileptic fit on 17 June 2010 while infield. On the 23rd, 26th of July 2010 and 13th August 2010 Alfred used the project vehicle thus disobeying a direct order.

2. **Unauthorised use of Sanparks property:**

On 23 July Alfred used the project vehicle to go to an area outside his normal working area (Parkwood). No authorisation was given for this.

On 13 August and 26 July Alfred used the bakkie to go home during work hours (Strandfontein / Mitchell's Plain). No authorisation was given for this.

3. **Grave dishonesty or fraud**:

False information was entered into the log sheet dated 23 July 2010. According to the log sheet Alfred stated that he went to Hout Bay to do final inspection and field inspections. But on the vehicle tracking system its [*sic*] indicated that he was in the Parkwood area on that day as well."

[6] The disciplinary hearing took place on 14 September 2010. The chairperson found that the employee had committed the misconduct. He imposed a final written warning on the first charge; however, flowing from the second and third charges, the employee was dismissed on 17 September 2010. He referred a dispute to the CCMA. Conciliation was unsuccessful and the arbitration took place over seven days between January and October 2011. The commissioner handed down his award on 7 November 2011.

The arbitration award

[7] The commissioner summarised the evidence of the employee and of three witnesses for Sanparks. They were De Kock, the assistant Cluster Manager for the Cape Cluster; Richard Williams, the chairman of the disciplinary hearing; and Ms Kogomodise Mabiti, the employee's field assistant.

[8] The commissioner correctly pointed out that the primary issue he needed to consider was whether dismissal was justified in respect of the second and third charges (i.e. unauthorised use of a company vehicle and grave dishonesty/fraud). The final written warning for the first charge was not challenged; however, the commissioner took it into account as a relevant factor as a possible aggravating circumstance relating to the second charge.

[9] With regard to the unauthorised use of a company vehicle, the employee admitted that De Kock had instructed him on 18 June 2010 not to drive official vehicles; and that he did drive an official vehicle on three occasions, i.e. 23 and 26 July and 13 August 2010. He argued that it was work-related.

[10] It is common cause that the employee went on a detour to Parkwood (a suburb near Dieprivier) on his way from Hout Bay to Tokai on 23 July 2010. It was a detour of about 5 km. The employee testified that, on his way back from Hout Bay with Mabiti, he decided to stop at a car upholstery repair place to have a look at the bakkie's seat that was damaging his uniform. The commissioner rejected this version on the probabilities. He found it puzzling why it was so urgent to get the problem attended to; there was no evidence of any torn clothing; and, when the vehicle was inspected during arbitration, there was no apparent problem with the seat. The commissioner found that the detour to Parkwood was not work-related.

[11] With regard to the trip on 26 July 2010, it is common cause that the employee used the official vehicle to drive home. He testified that he had left his flash drive at home; that it contained a report he had compiled over the weekend that was due that day; and that he therefore considered it a work related trip to fetch the flash drive. The commissioner found that, even if this version were to be accepted, the employee was not allowed to use the company vehicle without permission. He found that the employee's use of the vehicle on that day was unauthorised and for personal purposes.

[12] With regard to the third trip, on 13 August 2010, the employee acknowledged that he used the official vehicle to drive home for personal reasons (to fetch a bank card).

[13] In summary, the commissioner found that all three trips were for personal purposes and that they amounted to the unauthorised use of a company vehicle.

[14] Considering the third charge – grave dishonesty or fraud – the commissioner found that the employee was aware of the rule that he had to complete a point to point description of each journey. He found that the deviation from the direct route from Hout Bay to Tokai in order to visit Parkwood was a deviation of at least 5 km and this should have been recorded in the log sheet. Nevertheless, he accepted that the employee's failure to record these details "may well have been negligent rather than dishonest". The employee stated that he had completed the log sheet entry in Hout Bay before returning to Tokai, and at that point he had no intention of deviating from the route. The commissioner found that version to be reasonably possibly true. He noted that a charge of fraud or dishonesty implies an intention to defraud or to be dishonest, and Sanparks had not discharged the onus of proving, on a balance of probabilities, that the employee had such intent and, therefore, that he was guilty of fraud or grave dishonesty.

[15] In order to determine whether the dismissal of the employee was substantively fair the commissioner considered whether it was a justifiable sanction for the finding of guilt on the second charge, i.e. the unauthorised use of Sanparks' property.

[16] The commissioner took the following factors into account as aggravating circumstances:

16.1 the employee ignored an instruction not to drive official vehicles;

16.2 the employee was relatively senior and set a poor example to his subordinates by flouting the instruction.

[17] On the other side of the coin, and as mitigating factors, the commissioner took into account the following factors:

17.1 the employee had a clean disciplinary record over more than four years of service;

17.2 when confronted, the employee did not try to deny driving the vehicle, but admitted it and gave an explanation;

17.3 he expressed remorse;

17.4 he would have difficulty in finding other work due to his communication problems and epilepsy; and

17.5 Sanparks suffered minimal harm as a result of the employee's actions.

[18] With regard to the trust relationship, the commissioner found it "instructive" that the employee was not suspended pending his disciplinary hearing, despite acknowledging to De Kock that he had disobeyed his instruction.

[19] Taking into account all of the circumstances, the commissioner was not convinced that dismissal was an appropriate sanction. He formed the opinion that, if the employee had been issued with a final written warning for insubordination and unauthorised use of an official vehicle, it was most unlikely that further transgressions would have occurred; in other words, progressive discipline would in all probability have had the desired effect of correcting the employee's unacceptable behaviour. He also took into account the Sanparks disciplinary code that states:

> "The purpose of discipline is to correct unsatisfactory behaviour by encouraging acceptable performance rather than to punish. Punishment will therefore be regarded as a last resort in the event of an employee not heeding corrective action."

[20] Lastly, the commissioner acknowledged that reinstatement is the primary remedy provided for by the Labour Relations Act for a substantively unfair dismissal. Nevertheless, since the employee was not blameless, he found that the retrospectivity of reinstatement should be limited.

[21] In conclusion, the commissioner found that the dismissal was substantively unfair; he ordered Sanparks to reinstate the employee for the balance of his fixed term contract; he limited the retrospectivity of the reinstatement to eight months; and held that Sanparks would be entitled to

issue the employee with an appropriate warning in respect of insubordination and unauthorised use of Sanparks property for a maximum of 12 months from the date of reinstatement.

Review grounds

[22] The grounds of review were not clearly set out by Ms Khan in her founding affidavit. It appears that Sanparks belatedly instructed their attorneys of record. The attorneys only filed a notice of appointment as attorneys of record on the day of this hearing, although they had been instructed some days earlier. They also did not file a practice note. At the hearing, Ms *Ralehoko* confined the applicant's review grounds to the following:

22.1 the commissioner's finding that the employee had not committed fraud or grave dishonesty was unreasonable; and

22.2 the commissioner's finding that dismissal was not a fair sanction, was unreasonable.

Evaluation / Analysis

[23] Before dealing with the merits of the review applications, I need to consider three points *in limine*. They relate to:

23.1 Ms Khan's authority to act on behalf of Sanparks;

23.2 the late filing of the record; and

23.3 the late filing of the employee's answering affidavit.

Authority

[24] Ms Hawa Khan, Sanparks' Regional Human Resource Manager, deposed to the founding affidavit. She averred that she was "duly authorised to bring this application on behalf of the applicant and to dispose [*sic*] to this affidavit in support of the application."

[25] In his answering affidavit the employee challenged Khan's authority to depose to the applicant's founding and supplementary affidavits. In reply, Ms Khan merely attached an email, purportedly from one Tasneem Davids, reading as follows:

> "Hi Hawa
>
> This serves as confirmation from Regional General Manager: Cape, Gary De Kock, that this case will be taken on further review by Sanparks."

[26] It appears from the email that Davids is De Kock's personal assistant. However, neither of them delivered a confirmatory affidavit. The employee's attorney, Mr *Mgudlwa*, delivered his heads of argument on 15 October 2012 and once again raised the applicant's failure to provide any authority for Khan to act on its behalf. Once again, he requested a formal resolution from Sanparks granting Khan the required authority. Still she did nothing. Only at the hearing of this application on 13 June 2013 did Ms *Ralehoko,* after prompting by the Court, undertake to provide the requisite authority. And even then they only sent the Court a letter from the Regional General Manager of Sanparks on 14 June 2013 confirming that Ms Khan was authorised to take the matter on review. Ms Ralehoko added: "It has not been possible to obtain a resolution from the Board or a letter from SANPARKS National Labour Relations Manager on such short notice but my client is working on it." By the time of judgement, more than a month later, no such resolution has been forthcoming.

[27] As will become apparent under the next heading, this is unfortunately indicative of the uncooperative attitude that Ms Khan has taken to this litigation. However, I accepted Ms *Ralehoko*'s assurance that she had been instructed by Sanparks and not by Ms Khan, acting on her own, and the Court will deal with the merits of the dispute on that basis.

Condonation: late filing of record

[28] The commissioner handed down his award on 7 November 2011. Ms Khan delivered the review application on 15 December 2011. The CCMA filed the record of the arbitration proceedings shortly thereafter; Khan uplifted it on 10 January 2012. She only delivered the transcribed record and a notice in terms of rule 7A(8), together with her supplementary affidavit, on 19 July 2012 – more than six months later.

[29] The rule reads as follows:

> "**7A. Reviews**. —

(1) A party desiring to review a decision or proceedings of a body or person performing a reviewable function justiciable by the court must deliver a notice of motion to the person or body and to all other affected parties.

(2) The notice of motion must—

(a) call upon the person or body to show cause why the decision or proceedings should not be reviewed and corrected or set aside;

(b) call upon the person or body to dispatch, within 10 days after receipt of the notice of motion, to the registrar, the record of the proceedings sought to be corrected or set aside, together with such reasons as are required by law or desirable to provide, and to notify the applicant that this has been done; and

(c) be supported by an affidavit setting out the factual and legal grounds upon which the applicant relies to have the decision or proceedings corrected or set aside.

(3) The person or body upon whom a notice of motion in terms of subrule (2) is served must timeously comply with the direction in the notice of motion.

(4) If the person or body fails to comply with the direction or fails to apply for an extension of time to do so, any interested party may apply, on notice, for an order compelling compliance with the direction.

(5) The registrar must make available to the applicant the record which is received on such terms as the registrar thinks appropriate to ensure its safety. The applicant must make copies of such portions of the record as may be necessary for the purposes of the review and certify each copy as true and correct.

(6) The applicant must furnish the registrar and each of the other parties with a copy of the record or portion of the record, as the case may be, and a copy of the reasons filed by the person or body.

(7) The costs of transcription of the record, copying and delivery of the record and reasons, if any, must be paid by the applicant and then become costs in the cause.

(8) The applicant must within 10 days after the registrar has made the record available either—

(a) by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of the notice of motion and supplement the supporting affidavit; or

(b) deliver a notice that the applicant stands by its notice of motion.

(9) Any person wishing to oppose the granting of the order prayed in the notice of motion must, within 10 days after receipt of the notice of amendment or notice that the applicant stands by its notice of motion, deliver an affidavit in answer to the allegations made by the applicant.

(10) The applicant may file a replying affidavit within 5 days after receipt of an answering affidavit."

[30] Ms Khan did comply with the provisions of rule 7A (8). It must be said, though, that the transcriber of her choice, one Lorraine Heinemann of Eagle Transcription & Translation Services, did not live up to her pay-off line to "soar like an eagle / sweef soos 'n arend." Instead, she plummeted like a parrot in a Monty Python sketch. An attachment to one of her emails including a draft copy of the transcript sounds an optimistic note: "Believe in your heart that something wonderful is about to happen." Unfortunately, belief in the heart is not enough; it is also up to the person doing the job to do something practical about it. For the parties in this case, not much happened for the next six months.

[31] It appears that Heinemann sent portions of the transcription to Khan as she completed them. Khan took it upon herself to make corrections to the transcript. She acknowledges that these were "both of a substantial kind and of a typographical nature". On three occasions between 10 February and 28 May 2012 Khan filed notices, purportedly in terms of rule 12, seeking indulgences for the late filing of the record. Apart from Khan's insistence on making changes to the transcript, Heinemann gave her a litany of excuses why she could not complete the transcript in time. This included the following:

"I have a lot of admin work to do in the New Year as well, I have not yet had time to see SARS, just been occupied on the transcriptions.

A day takes about a working week to type up, I have been putting in time on evenings and weekends as well. I have postponed getting a lift to SARS etc as have to attend to your assignment [*sic*].

I cannot run up high wages to pay assistants who mess up – there is too much checking and changing involved.

I am just going to the banks to pay wages to the people who helped and typed drafts.

I will wrap up this week [on 5 March 2012], it is looking good – Letitia made a mess, I corrected her transcription of the last part of day 5. Now only day 6.

I will email you as soon as affidavit is ready, I typed it up, but did not have to run to police as a commissioner of oaths offered to do it for me tomorrow when I see her.

Client ... approached me with a small job, then it blew into something bigger, so I had to give the work and Veritas are now doing the disciplinary hearing of ... who left for Dubai before the hearing was over; so again I try to help, now I am in a pickle, but I will check those files for you.

I had to sort out my equipment and the week is too short to finish.

Apologies again for the delays, I had to attend to something urgent and have cancelled further student work so as to complete your job. I had flu as well.

It will go faster now, apologies again, I had a lot of opposition [*sic*].

On 24 May I must also see specialist at GS hospital re failed Weil in 2008 (left foot), both feet, in fact.

I still have a lot of arrear admin work to attend to.

I also had to attend to other urgent work in between for quicker income.

I injured my leg in 2003 and had surgery in July after it being diagnosed as squamous cell carcinoma. I am fine now, but still go for regular checkups, so this will not interfere with the transcription typing.

I am working on day 6, I must be at day hospital tomorrow morning at 7 o'clock about this terrible wart on my finger.

Apologies for delay, just making tea."

[32] The employee's attorneys wrote to Sanparks at least three times requesting it to speed up the transcription and informing it of the need to apply for condonation for the late filing of the record.

[33] On 19 July 2012 Khan finally delivered the record, together with a notice in terms of rule 7A(8) and her supplementary affidavit. She did not deliver an application for condonation.

[34] The employee and his attorneys were not satisfied that the transcript delivered by Khan was the original one, *inter alia* because it was about 200 pages shorter than the one that the employee's attorneys received from the transcriber. There asked for directions from this court and the parties were directed to appear at court on 9 November 2012. Sanparks failed to do so. The court ordered it to apply for condonation within 10 days. Sanparks did so on 23 November 2012.

[35] The employee filed his answering affidavit in the condonation application on 7 December 2012 and Khan filed her replying affidavit on 14 December 2012.

[36] In her application for condonation, Khan said that she was "not certain exactly which period of time I am required to seek condonation [*sic*]." Only in the heads of argument did she somewhat reluctantly concede that "rule 7A(8) indirectly obliges the applicant on review to file the record, together with a notice or supplementary affidavit in terms of the subrule within 10 days of the record being made available by the registrar."

[37] Of course, that is simply not so. There is nothing indirect about the peremptory instruction in rule 7A (8) that the applicant must file its notice and accompanying affidavit within 10 days after the registrar had made the record available. And even if this may be impractical in certain cases – such as this one, where the arbitration spanned seven days – the applicant has to take steps to hurry the process along.

[38] In this case, Khan made unilateral amendments to the transcription of the record, thus adding to the delays occasioned by the transcriber. However, much of the delay is to blame on the transcriber. In my view, parties cannot be blamed for correcting patent errors in the transcript – indeed,

they would be remiss if they did not do so and caused an incorrect transcript to be placed before the court. But then it must be by agreement, and it would not be often that those corrections go beyond correcting the spelling of names or other patent errors.

[39] Khan's attitude has not been helpful. For example, she refused to apply for condonation until directed to do so by this court. The explanation for not appearing at court on 9 November 2012 is also not convincing. However, I accept that the delay in complying with rule 7A(8) was mainly due to the poor service provided by the transcriber. In these circumstances, it is in the interests of justice to grant condonation and to deal with the merits of the matter. The costs relating to the condonation application are to be costs in the cause of the review application.

Condonation: late filing of answering affidavit

[40] Sanparks delivered its supplementary affidavit in terms of rule 7A(8) on 19 July 2012. It did not apply for condonation for its late filing until 23 November 2012.

[41] The employee delivered his answering affidavit in the review application on 4 September 2012. In terms of rule 7A(9), he should have done so within 10 days after 19 July 2012, i.e. by 2 August 2012. He delivered it about one month late.

[42] In his affidavit, the employee contended that he need not apply for condonation, as his answering affidavit "only became due for delivery once the applicant's late delivery of the record, its rule 7A(8) notice and the supplementary affidavit had been condoned".

[43] I do not agree. Rules 7A(8) and (9) are clear and peremptory. It is for this Court to decide whether the applicant's non-compliance with rule 7A(8) should be condoned; but that does not mean that a respondent can sit on his hands and do nothing until that issue has been decided. That would, in my view, only exacerbate the delays that the employee is already complaining about.

[44] I take into account, though, that at the time the transcribed record was filed, the parties could not agree on its authenticity. That was only resolved

after the employee approached and appeared before this Court on 9 November 2012. In the interim, he did deliver the application for condonation.

[45] Given the delays occasioned by the applicant, the interim delay of a month – while there was still a dispute about the record – occasioned by the employee is not excessive. He has satisfactorily explained the delay and it has not led to any prejudice to Sanparks. It is in the interests of justice that the late filing of the answering affidavit also be condoned and the matter be decided on its merits. Costs of this condonation application will also be costs in the cause of the review application.

Review application: the merits

[46] As noted above, Ms *Ralehoko* restricted her oral argument to two review grounds. I shall deal with each.

First review ground: finding on 'charge three'

[47] Ms *Ralehoko* argued that the commissioner's finding that Sanparks had not discharged the onus to show that the employee was guilty of fraud or gross dishonesty, was one that a reasonable decision-maker could not reach.[1]

[48] The commissioner did not find that the employee committed no misconduct. He found that the employee was negligent but not dishonest. Another reasonable commissioner could have reached the same conclusion.

[49] The commissioner accepted the employee's evidence that he had filled in the log sheet when he departed from Hout Bay to drive back to Tokai. That is not an improbable explanation. On the way, he decided to make the detour to Parkwood. It was not an extensive detour, albeit unauthorised. It is not improbable that the employee neglected to fill in a new log sheet, having already filled in the trip from Hout Bay to Tokai. Another

[1] *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC) para [110]; *Wasteman Group v SAMWU* (2011) 32 *ILJ* 1057 (LAC); *SAB v CCMA* [2012] 9 BLLR 936 (LC).

commissioner could have come to the same conclusion, based on the evidence before him or her.

Second review ground: sanction

[50] In deciding whether a sanction is fair, it is the commissioner's sense of fairness that must prevail and not the employer's view.[2]

[51] Ms *Ralehoko* argued that the commissioner in this case nevertheless came to a conclusion regarding the fairness of the sanction of dismissal that no other commissioner could reach. In this regard, she stressed that the employee had disregarded the instruction not to drive Sanparks vehicles on three occasions; that he had transgressed a rule; and that he had abused Sanparks' time and resources.

[52] The commissioner took both aggravating and mitigating factors into account. He specifically considered the fact that the employee had ignored instructions. He also accepted that the instruction was given for a good reason, to safeguard the safety of Mr Nemahunguni and other employees and Sanparks' property. He was a senior employee and set a bad example. On the other hand, he had a clean disciplinary record; he came clean when confronted; he expressed remorse; and he would have difficulty in finding another job.

[53] The factors considered by the commissioner are reminiscent of some of those outlined by Navsa AJ in *Sidumo:*[3]

> "The absence of dishonesty is a significant factor in favour of the application of corrective discipline rather than dismissal. So too, is the fact that no losses were suffered. His years of clean service were certainly a significant factor. There is no indication that the principle of progressive discipline will not assist to adjust Mr Sidumo's attitude and efficiency. In my view, the commissioner carefully and thoroughly considered the different elements of the Code and properly applied his mind to the question of the appropriateness of the sanction."

[2] *Sidumo (supra)* para [75].

[3] *Supra* para [117].

[54] The commissioner applied his mind to all the circumstances, including aggravating and mitigating factors. He applied corrective discipline in line with Sanparks' disciplinary code. He limited the retrospective effect of his award. He came to a reasonable conclusion, based on his own sense of fairness. His decision passes the *Sidumo* test.

Conclusion

[55] The award is not open to review as opposed to appeal.[4] With regard to costs, I take into account that the employee, who had an award in his favour, has had to incur significant legal costs in order to defend it. His fixed term contract has expired by now. He will effectively be awarded compensation only and he is, according to his answering affidavit in the condonation application, still unemployed. In law and fairness, Sanparks should be ordered to pay his costs.

Order

[56] I therefore make the following order:

56.1 Condonation for the late filing of the record and of third respondent's answering affidavit is granted. Costs of both applications are costs in the cause of the main application for review.

56.2 The application for review is dismissed with costs.

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Steenkamp J

[4] Cf *Coetzee v Lebea NO* (1999) 20 *ILJ* 129 (LC) para [10].

APPEARANCES

APPLICANT:	T Ralehoko of Cheadle Thompson & Haysom.
THIRD RESPONDENT:	B Mgudlwa of Bowman Gilfillan.