CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 08/13
[2013] ZACC 37

In the matter between:

DERRICK GROOTBOOM — Applicant

and

NATIONAL PROSECUTING AUTHORITY — First Respondent

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT — Second Respondent

Heard on : 23 May 2013

Decided on : 21 October 2013

JUDGMENT

BOSIELO AJ (Moseneke J, Froneman J, Jafta J, Khampepe J, Mhlantla AJ, Nkabinde J and Skweyiya J concurring):

Introduction

[1] This is an application for leave to appeal against a decision of the Supreme Court of Appeal refusing the applicant, Mr Grootboom, special leave to appeal against

a judgment of the Labour Appeal Court. Effectively, the Labour Appeal Court[1] endorsed his deemed discharge from employment by the National Prosecuting Authority (NPA). The deemed discharge was based on section 17(5)(a)(i) of the Public Service Act[2] (Act). This section allows for the deemed discharge, by mere operation of law and without prior notice or hearing, of any officer, other than a member of the military, police or correctional services or an educator or a member of the National Intelligence Services, who absents himself or herself from his or her official duties for longer than one calendar month without his or her employer's permission.

[2] Essentially, the respondents' case is that by going to the United Kingdom (UK) on a 12-month study programme whilst on suspension and without their permission, the applicant brought himself squarely within the section's purview and that he was correctly discharged. On the contrary, the applicant contends that, although most of the requirements of the section have been satisfied, the respondents failed to prove that by going to the UK on a scholarship for 12 months he had absented himself from official duties.

[1] *Grootboom v National Prosecuting Authority and Another* [2012] ZALAC 28; (2013) 34 ILJ 282 (LAC); [2013] 5 BLLR 452 (LAC).

[2] 103 of 1994. Section 17(5) of the Act has since been substituted by section 25 of the Public Service Amendment Act 30 of 2007, and is now subsection 17(3)(a) and (b) of the Public Service Act. There are no material differences between the two sections. The full text of section 17(5) is reproduced in [39][39] below.

[3] This appeal therefore turns on the correct interpretation and application of the section. In other words, the question is whether all the jurisdictional requirements embedded in the section have been met.

Background

[4] This matter chronicles the long legal route travelled by the applicant from his initial suspension in 2005 to his appearance before us in 2013, a total of some eight years. With the effluxion of time the matter morphed into an arduous legal battle starting when the applicant, who was employed by the NPA as a public prosecutor from April 2001, was suspended by the NPA on 22 June 2005 on allegations of misconduct. This was followed by a disciplinary hearing starting in September 2005, which culminated in the presiding officer imposing the sanction of dismissal on 21 November 2005.

[5] Aggrieved by this decision, the applicant referred the dispute to the General Public Service Sectoral Bargaining Council for arbitration. On 1 June 2006, the parties settled the dispute. The findings of the disciplinary hearing were set aside and the matter was referred to a pre-dismissal arbitration. I interpose to state that throughout this saga, the applicant was, as part of his conditions of suspension, prohibited from coming to his place of employment, performing any duties for his employer or having any contact with the staff of the NPA unless authorised to do so.

[6] Whilst on precautionary suspension, the applicant was shortlisted by the Nelson Mandela Scholarship Fund for a 12-month scholarship to study in the UK. On 18 January 2006, he wrote an email to the NPA enquiring whether it would be willing to grant him provisional study leave for 12 months to enable him to pursue the scholarship. The NPA replied that the applicant's request would be granted, subject to the condition that such leave would be without pay. The explanation was that, in his absence, the NPA would have to employ a replacement who would have to be paid. A further condition was that the applicant had to complete the requisite leave forms.[3]

[7] There was some delay in commencing with the pre-dismissal arbitration. After some frantic enquiries by the applicant, the pre-dismissal arbitration was eventually set down for 14 and 17 August 2006 (later amended to 16 and 17 August 2006). The applicant complained that as he had not been given 14 days' notice of the hearing, he had insufficient time to prepare. At his request the hearing was postponed indefinitely until he returned from his leave in the UK.

[8] On 17 August 2006, the applicant went to the NPA's offices in Upington to complete and sign the requisite forms for his study leave. It seems that there was a disagreement between the applicant and his senior, Mr Engelbrecht, who insisted,

[3] The NPA stated in an email as follows:

> "Dear Mr Grootboom
>
> It's a pleasure to inform you that after deliberation with management, it concluded that study leave for a year be granted to you upon official request, however, with certain conditions, that is leave be granted without pay, this is to enable the NPA to find a temporary replacement for your post.
>
> Other than that, normal forms should be processed following normal procedures."

contrary to the applicant's expectations, that the leave was to be without pay. The two could not agree and the applicant left the offices without having completed and signed the leave forms.

[9] On 18 August 2006, the applicant left for the UK to pursue his 12-month study programme at the University of Southampton. The NPA continued paying his salary. It was only on 31 October 2006 that the NPA unilaterally and without any prior notice discontinued the applicant's salary. Dissatisfied with this decision, the applicant wrote an email to the NPA requesting that his salary be reinstated.

[10] Instead of reinstating his salary, the NPA wrote an email to the applicant on 1 February 2007, advising him that in terms of section 17(5)(a)(i) of the Act, as he had not been granted permission to go on study leave outside the Republic, he was by operation of law deemed to have been discharged from the public service with effect from 15 September 2006. This email is the genesis of this legal battle. Notably, the applicant was advised in the same email, that in terms of section 17(5)(b) of the Act, he had the right to make representations to the Minister of Justice and Constitutional Development (Minister) for his reinstatement. The applicant remained in the UK and continued with his studies. He only returned to the Republic on 30 July 2007.

[11] Upon his return, the applicant, acting in terms of section 17(5)(b), submitted written representations to the Minister on 5 September 2007, in an attempt to show good cause for having gone away for 12 months on the study programme and to

secure his reinstatement. The NPA replied by a letter dated 22 February 2008 advising him that the Minister "has applied her mind to [his] representations and has upheld [his] deemed discharge by operation of law." Interestingly, the letter concludes by advising the applicant that he "may seek a remedy to the decision from the High Court".

Litigation history

[12] The applicant instituted proceedings in the Labour Court in terms of section 158(1)(h) of the Labour Relations Act[4] to have his deemed discharge reviewed and set aside under section 6(2) of the Promotion of Administrative Justice Act[5] (PAJA).

[13] In dismissing the application the Labour Court held, first, that in terms of section 17(5)(a)(i) the applicant was discharged by operation of law and that therefore the respondents had not taken any decision that could be reviewed and set aside in terms of PAJA. In other words, the respondents had not performed any administrative action. Second, it found that by going to the UK on a 12-month scholarship without the NPA's permission, the applicant had absented himself as envisaged by section 17(5)(a)(i). It reasoned as follows:

> "In this respect the applicant contended that the [NPA] was aware that he would be leaving on a scholarship to study outside the country. I have earlier in this judgment indicated that a suspended employee has a duty to inform his or her employer about

[4] 66 of 1995, read with section 157(2) of the Labour Relations Act.

[5] 3 of 2000.

> his or her whereabouts during the period of suspension and may have to seek permission if he or she is to be away in circumstances that he or she would not be able to resume duty if he or she was so directed by the employer. The fact that the employer had knowledge about his whereabouts is irrelevant as what is key is whether or not the absence was authorised. The facts of this case indicate very clearly that the applicant never received authority to be away for an excessive period of one year. The criteria for [invoking] the provisions of section 17(5)(a) of the [Act] [were] in my view satisfied and thus the [NPA] was entitled to [invoke] the provisions of that subsection."[6]

[14] Aggrieved by the Labour Court's dismissal of his application, the applicant appealed to the Labour Appeal Court. Adopting similar reasoning, the Labour Appeal Court broadly endorsed the findings of the Labour Court and dismissed the appeal with costs. In the main, the Labour Appeal Court agreed with the Labour Court that the applicant's services were terminated by operation of law and that the respondents had not taken any decision or action which could be reviewed and set aside. For this finding the Labour Appeal Court relied on *Louw*[7] and *Phenithi*.[8] Regarding the basis for his deemed discharge, it agreed that the Labour Court was correct in finding that, by his conduct, the applicant had brought himself within the net of section 17(5)(a)(i). It concluded that he was discharged by mere operation of law.

[15] Notably in deciding *Louw*, which dealt with section 72 of the Education Affairs Act,[9] the Appellate Division held:

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[6] *Grootboom v National Prosecuting Authority and Another* [2009] ZALC 143; (2010) 31 ILJ 1875 (LC); [2010] 9 BLLR 949 (LC) at para 50.

[7] *Minister van Onderwys en Kultuur en Andere v Louw* [1994] ZASCA 160; 1995 (4) SA 383 (A) at 388.

[8] *Phenithi v Minister of Education and Others* [2005] ZASCA 130; 2008 (1) SA 420 (SCA) at paras 9-11.

[9] 70 of 1988. Section 72 is almost identical to section 17(5)(a)(i).

> "In the present case, the respondent was notified in the dismissal letter that he had been dismissed. It did not flow from a discretionary decision, but was purely a communication of a consequence that, in the appellants' view, followed by operation of law."[10] (My translation.)

[16] Some 11 years after *Louw*, whilst dealing with a similar situation, the Supreme Court of Appeal in *Phenithi* endorsed *Louw*:

> "In my view, the *Louw* judgment is definitive of the first issue in the present matter, viz whether the appellant's discharge constitutes an administrative act. . . . There was no suggestion that *Louw* was wrongly decided. There being no 'decision' or 'administrative act' capable of review and setting aside, the second part of the first prayer in casu, viz that the 'decision be declared an unfair labour practice', falls away."[11]

I cannot fault the Labour Court and Labour Appeal Court for relying on the principle established in the two cases cited above.

[17] Undeterred by this second setback, the applicant sought succour from the Supreme Court of Appeal. On 7 January 2013, the Supreme Court of Appeal dismissed the application for special leave to appeal with costs.

[18] Thereafter, the applicant sought the leave of this Court to appeal the decision of the Labour Appeal Court. I pause to observe that before both the Labour Appeal

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[10] *Louw* above n 7 at 388:

> "In casu is die respondent in die afdankingsbrief in kennis gestel dat hy ontslaan was. Dit was nie die uitvloeisel van 'n diskresionêre besluit nie, maar slegs 'n mededeling van 'n gevolg wat volgens die appellante se beskouing van regsweë ingetree het."

[11] *Phenithi* above n 8 at para 10.

Court and us the applicant represented himself without the guiding hand of counsel. The unfortunate consequence is that his papers are somewhat muddled and, as a result, we had to trawl through a confusing maze of averments to discern the applicant's real cause of action.

Issues

[19] The following questions require determination:

(a) Should the respondents' delay in filing opposing papers and written submissions be condoned?

(b) Should leave to appeal be granted?

(c) Have the jurisdictional requirements of section 17(5)(a)(i) been met?

(d) What costs order is appropriate?

Condonation

[20] The respondents were late in filing their answering affidavits as well as their written submissions. This delay put a serious hurdle in the way of their quest to be heard in this Court: they had to apply for condonation. It is axiomatic that condoning a party's non-compliance with the rules of court or directions is an indulgence. The court seized with the matter has a discretion whether to grant condonation.

[21] The failure by parties to comply with the rules of court or directions is not of recent origin. Non-compliance has bedevilled our courts at various levels for a long

time. Even this Court has not been spared the irritation and inconvenience flowing from a failure by parties to abide by the Rules of this Court.

[22] I have read the judgment by my colleague Zondo J. I agree with him that, based on *Brummer*[12] and *Van Wyk*,[13] the standard for considering an application for condonation is the interests of justice. However, the concept "interests of justice" is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both *Brummer* and *Van Wyk* emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors but it is not necessarily limited to those mentioned above. The particular circumstances of each case will determine which of these factors are relevant.

[23] It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the

[12] *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3.

[13] *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 20.

non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default.[14]

[24] In determining whether condonation should be granted, I deal briefly with the factual background against which this application has to be evaluated. According to the Rules the respondents had to file their answering affidavit by 8 February 2013. They only filed on 25 March 2013: a delay of 30 court days. There is no reasonable explanation for this delay. In terms of the first set of directions issued by this Court on 21 February 2013, the respondents were required to file their written submissions by 22 April 2013. Once again, they did not comply. This inaction prompted the Court to issue further directions on 10 May 2013, calling upon them to file written submissions and an application for condonation by 14 May 2013. Even then the respondents failed to comply, only filing their written submissions on 15 May 2013, after a delay of some 15 court days. It is clear that the respondents' legal representatives had adopted a trend of flagrantly, if not recklessly, failing to comply with directions of the Court.

[25] What follows is the explanation proffered by the respondents for their non-compliance. First, Ms Bailey, an assistant State Attorney who is responsible for handling this case on behalf of the respondents, admits that she received the Court's directions on 21 February 2013. She was thus aware of the date of set-down and, in particular, the other dates for the further management of this case. She even furnished

[14] *Von Abo v President of the Republic of South Africa* [2009] ZACC 15; 2009 (5) SA 345 (CC); 2009 (10) BCLR 1052 (CC) at para 20 and *Van Wyk* above n 1313 at para 22.

counsel with a copy of the directions. Notwithstanding this, she failed to file written submissions in accordance with the Court's directions. Her primary explanation is that she forgot to diarise the file.

[26] During subsequent consultation with counsel, she decided not to file written submissions and failed to file a notice of withdrawal of opposition. Clearly, this is contrary to the Court's directions. She does not state in her affidavit what the reasons were for this decision. During the week of 6 May 2013, she again spoke to counsel and undertook to seek permission from the NPA for counsel to be given a watching brief. Nothing happened until 13 May 2013 when Ms Luter, the State Attorney who is Ms Bailey's senior, alerted her to the new directions from this Court. Faced with this rather embarrassing situation, Ms Bailey was left with no choice but to concede that she had been remiss in her handling of this case.

[27] Save for expressing some remorse for the unprofessional manner in which her office dealt with this matter, Ms Luter offered no explanation for this disturbing trend. However, to her credit, when she discovered this lapse she reacted promptly and tried to salvage the situation. Regrettably, she has not offered any explanation why she did not notice this lapse earlier. This points to some laxity in the office. However, as the official in charge of the office she has offered her apologies to this Court for the inconvenience. This evinces her appreciation for her duty and responsibility to the Court, her clients and other parties to the litigation. This should be seen in the light of her responsibility to assist the courts to maintain their "independence,

impartiality, dignity, accessibility and effectiveness".[15] One can only hope that she will inculcate the same sense of conscientiousness in her subordinates to avoid a recurrence of such an embarrassing situation.

[28] The applicant opposed the condonation application. The nub of his submission is that the respondents, having failed to offer an adequate explanation for their non-compliance, have failed to make a case for condonation.

[29] During the hearing counsel for the respondents could offer no acceptable explanation. Confronted with this quandary, he had to concede that the lapses are inexcusable. Ordinarily, this concession would have sounded the death-knell of the respondents' case.

[30] There is another important dimension to be considered. The respondents are not ordinary litigants. They constitute an essential part of government. In fact, together with the office of the State Attorney, the respondents sit at the heart of the administration of justice. As organs of state, the Constitution obliges them to "assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."[16]

[15] Section 165(4) of the Constitution.

[16] Id.

[31] In terms of section 179(2) of the Constitution,[17] the NPA is responsible for instituting criminal proceedings on behalf of the State. The Minister is the political head responsible for administering the Department of Justice and Constitutional Development. The primary duty of the office of the State Attorney is to serve the interests of the government by initiating proceedings on behalf of or defending any proceedings against the state.[18]

[32] I need to remind practitioners and litigants that the rules and courts' directions serve a necessary purpose. Their primary aim is to ensure that the business of our courts is run effectively and efficiently. Invariably this will lead to the orderly management of our courts' rolls, which in turn will bring about the expeditious disposal of cases in the most cost-effective manner. This is particularly important given the ever-increasing costs of litigation, which if left unchecked will make access to justice too expensive.

[33] Recently this Court has been inundated with cases where there have been disregard for its directions. In its efforts to arrest this unhealthy trend, the Court has issued many warnings which have gone largely unheeded. This year, on 28 March 2013, this Court once again expressed its displeasure in *eThekwini*[19] as follows:

[17] The section reads: "The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings."

[18] See section 3(1) of the State Attorney Act 56 of 1957.

[19] *eThekwini Municipality v Ingonyama Trust* [2013] ZACC 7; 2013 (5) BCLR 497 (CC) (*eThekwini*).

> "The conduct of litigants in failing to observe Rules of this Court is unfortunate and should be brought to a halt. This term alone, in eight of the 13 matters set down for hearing, litigants failed to comply with the time limits in the rules and directions issued by the Chief Justice. It is unacceptable that this is the position in spite of the warning issued by this Court in the past. In [*Van Wyk*], this Court warned litigants to stop the trend. The Court said:
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> > 'There is now a growing trend for litigants in this court to disregard time limits without seeking condonation. Last term alone, in eight out of ten matters, litigants did not comply with the time limits or the directions setting out the time limits. In some cases litigants either did not apply for condonation at all or if they did, they put up flimsy explanations. This non-compliance with the time limits or the rules of Court resulted in one matter being postponed and the other being struck from the roll. This is undesirable. This practice must be stopped in its tracks.'
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> The statistics referred to above illustrate that the caution was not heeded. The Court cannot continue issuing warnings that are disregarded by litigants. It must find a way of bringing this unacceptable behaviour to a stop. One way that readily presents itself is for the Court to require proper compliance with the rules and refuse condonation where these requirements are not met. Compliance must be demanded even in relation to rules regulating applications for condonation."[20] (Footnotes omitted.)

[34] The language used in both *Van Wyk* and *eThekwini* is unequivocal. The warning is expressed in very stern terms. The picture depicted in the two judgments is disconcerting. One gets the impression that we have reached a stage where litigants and lawyers disregard the Rules and directions issued by the Court with monotonous regularity. In many instances very flimsy explanations are proffered. In others there is no explanation at all. The prejudice caused to the Court is self-evident. A message

[20] Id at paras 26-7.

must be sent to litigants that the Rules and the Court's directions cannot be disregarded with impunity.

[35] It is by now axiomatic that the granting or refusal of condonation is a matter of judicial discretion. It involves a value judgment by the court seized with a matter based on the facts of that particular case. In this case, the respondents have not made out a case entitling them to an indulgence. It follows that their application must fail.

Should leave to appeal be granted?

[36] The applicant will succeed with his application for leave to appeal if he shows that a constitutional matter is raised, and that the interests of justice require the Court to grant leave.[21] Although not decisive, the existence of prospects of success is an important component of the interests-of-justice analysis.[22]

[37] This matter revolves around the correct interpretation and application of section 17(5)(a)(i) of the Act. Section 39(2) of the Constitution requires legislation to be interpreted to promote the spirit, purport and objects of the Bill of Rights. This Court has held that a constitutional issue is raised where the interpretation of legislation may impact on a fundamental right of a litigant under the Bill of Rights.[23]

[21] Section 167(3)(b)(i) of the Constitution. See *Radio Pretoria v Chairperson, Independent Communications Authority of South Africa and Another* [2004] ZACC 24; 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) at para 19.

[22] See *Brummer* above n 12 at para 3 and *Fraser v Naude and Others* [1998] ZACC 13; 1999 (1) SA 1 (CC); 1998 (11) BCLR 1357 (CC) at para 7.

[23] See *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC) at paras 19-22 and *Law Society of South Africa and Others v Minister for Transport and Another* [2010] ZACC 25; 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC) at paras 12 and 57-67.

Section 17(5)(a)(i) effectively countenances the dismissal of a state employee without a hearing. That implicates the right to fair labour practices enshrined in section 23 of the Constitution. The constitutionality of the section is not attacked; hence it must be interpreted in a manner best compatible with the Constitution.[24] A constitutional issue is thus at stake here.

[38] Section 17(5) has the potential to affect people employed in the public service. Its reach is extensive. It has the adverse effect of terminating employment for misconduct without notice or hearing, and it is therefore important for this Court to determine the proper scope of its application. The appeal has prospects of success. It would thus be in the interests of justice to grant leave to appeal.

Have the jurisdictional requirements of section 17(5) been met?

[39] Section 17(5) provides:

> "(a) (i) An officer, other than a member of the services or an educator or a member of the National Intelligence Services, who absents himself or herself from his or her official duties without permission of his or her head of department, office or institution for a period exceeding one calendar month, shall be deemed to have been discharged from the public service on account of misconduct with effect from the date immediately succeeding his or her last day of attendance at his or her place of duty.

[24] See *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* [2008] ZACC 12; 2009 (1) SA 337 (CC); 2008 (11) BCLR 1123 (CC) at para 107 and *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 21-6.

(ii) If such an officer assumes other employment, he or she shall be deemed to have been discharged as aforesaid irrespective of whether the said period has expired or not.

(b) If an officer who is deemed to have been so discharged, reports for duty at any time after the expiry of the period referred to in paragraph (a), the Commission may, notwithstanding anything to the contrary contained in any law, recommend that, subject to the approval of the relevant executing authority, he or she be reinstated in the public service in his or her former or any other post or position on such conditions as the Commission may recommend, and in such a case the period of his or her absence from official duty shall be deemed to be absence on vacation leave without pay or leave on such other conditions as the Commission may recommend."

[40] The applicant's primary ground of appeal was an attack on the application of section 17(5)(a)(i). Given my findings in this regard, it is unnecessary to say anything more about his other grounds of appeal. The applicant submits that the respondents have failed to prove that, by going to the UK on a study programme, he absented himself from his official duties as contemplated by the section. The premise of this argument is that it is fallacious for the respondents to suggest that the applicant had absented himself from his employment. This is so because he had already been placed on suspension and prohibited from performing any official duties with clear instructions not to come to his place of employment or have any contact with the NPA's staff.[25] It was therefore impossible for him to absent himself from his place of

[25] The applicant also relied on section 20(1) read with subsection (7) of the National Prosecuting Authority Act 32 of 1998 which prohibits him from performing any duties as a public prosecutor whilst under suspension:

"(1) The power, as contemplated in section 179(2) and all other relevant sections of the Constitution, to—

(a) institute and conduct criminal proceedings on behalf of the State;

(b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and

(c) discontinue criminal proceedings,

employment within the meaning of section 17(5)(a)(i) from when his employer expressly required his absence from the workplace.

[41] The following facts appear to be common cause. The applicant was employed by the NPA as a public prosecutor. In 2005, he was placed on precautionary suspension with pay. As part of the conditions of his suspension he was prevented from coming to his place of employment, communicating with his colleagues or performing any functions or duties for the NPA during his suspension. Whilst still on suspension and without permission, he left for the UK on a scholarship. The question is whether his conduct amounts to absenting himself from his official duties without permission.

[42] It is so that the applicant was absent from his employment. He was absent because he was suspended. This means that he was absent with the permission of his employer. Therefore, one of the essential requirements of section 17(5)(a)(i) has not been met.

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vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic.

. . .

(7) No member of the prosecuting authority who has been suspended from his or her office under this Act or any other law shall be competent to exercise any of the powers referred to in subsection (1) for the duration of such suspension."

[43] Does his departure to the UK detract from the fact that he was still on suspension? Whilst grappling with the meaning of the word "suspension" in *Gladstone*[26] the Court stated:

> "When an employee is 'suspended' it appears to me that apart from any express instructions he must hold himself available to perform his duties if called upon; though for the time being he is debarred from doing his work. . . . First of all, if suspension is to be interpreted in the manner which I have indicated, it is an open question whether the man who is suspended may or may not be called upon to render further services".[27]

[44] The Appellate Division grappled with the same legal question in *Masinga*,[28] which concerned a suspended employee of the KwaZulu Department of Justice. That case applied a different albeit similarly worded section, namely section 19(29) of the KwaZulu Public Service Act.[29] However, on the facts *Masinga* is distinguishable.[30]

[45] Although one might be tempted to conclude that, by virtue of having undertaken a scholarship to the UK, the applicant would, in all likelihood, have found it impractical to return to resume his employment if he were recalled, I find such a conclusion to be unfounded and speculative in the absence of any evidence that he

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[26] *Gladstone v Thornton's Garage* 1929 TPD 116 as cited with approval in *Gumede v Mapumulo Bantu School Board and Another* 1961 (4) SA 639 (D) at 646B-C.

[27] *Gladstone* above n 26 at 119.

[28] *Masinga v Minister of Justice, KwaZulu Government* [1995] ZASCA 21; 1995 (3) SA 214 (A). On a plain reading of the section, it appeared that Mr Masinga fell foul of the section by obtaining alternative employment whilst under suspension. It was contended that, by doing so, Mr Masinga had put himself in a position which was incompatible with his continued employment. This argument did not find favour with the Court.

[29] 18 of 1985.

[30] In the present case the applicant did not find any employment during his suspension. All he did was leave the country on a study programme. It follows therefore that the mere fact of being away on a scholarship cannot without more constitute a breach of section 17(5)(a)(i).

was called to take up his duties and failed to do so. Moreover, the NPA knew where the applicant was at all relevant times as it was communicating with him via email. It made a conscious decision not to recall but to discharge him. This fact leads me inexorably to conclude that the finding by both the Labour Court and the Labour Appeal Court in this regard is wrong.

[46] In conclusion, the appeal must succeed.

Costs

[47] The applicant argued for a punitive costs order against the respondents based on their conduct which I have found to be reprehensible. However, except for the Labour Court, the applicant appeared in person. Justice requires that the respondents be ordered to pay the applicant's legal costs in the Labour Court and his necessary disbursements in the Labour Appeal Court, Supreme Court of Appeal and this Court.

Order

[48] The following order is made:

1. The respondents' applications for condonation are dismissed.
2. Leave to appeal is granted.
3. The appeal is upheld.
4. The orders of the Labour Court and Labour Appeal Court are set aside.
5. It is declared that the applicant did not absent himself from his official duties without permission as contemplated in section 17(5)(a)(i) of the

Public Service Act 103 of 1994 and that he continues to be in the first respondent's employ.

6. The respondents are ordered to pay the applicant's costs in the Labour Court as well as his necessary disbursements in the Labour Appeal Court, Supreme Court of Appeal and Constitutional Court, jointly and severally.

ZONDO J:

[49] I have had the opportunity of reading the judgment prepared by my Colleague, Bosielo AJ (main judgment). For the reasons given by Bosielo AJ, I agree that:

(a) this matter raises a constitutional issue;

(b) leave to appeal should be granted;

(c) the appeal must be upheld; and

(d) a declaratory order should be made to the effect that the applicant did not absent himself from his official duties as contemplated in section 17(5)(a)(i) of the Act and he continues to be in the first respondent's employ.

However, I am unable to agree that the respondents must be refused condonation for the late delivery of their answering affidavit and written submissions. In my view the respondents should be granted condonation. I set out below my reasons for this conclusion.

[50] In this Court the test for determining whether condonation should be granted or refused is the interests of justice. If it is in the interests of justice that condonation be granted, it will be granted. If it is not in the interests of justice to do so, it will not be granted. The factors that are taken into account in that inquiry include:

(a) the length of the delay;

(b) the explanation for, or cause for, the delay;

(c) the prospects of success for the party seeking condonation;

(d) the importance of the issue(s) that the matter raises;

(e) the prejudice to the other party or parties; and

(f) the effect of the delay on the administration of justice.[31]

Although the existence of the prospects of success in favour of the party seeking condonation is not decisive, it is an important factor in favour of granting condonation.[32]

[51] The interests of justice must be determined with reference to all relevant factors.[33] However, some of the factors may justifiably be left out of consideration in certain circumstances. For example, where the delay is unacceptably excessive and there is no explanation for the delay, there may be no need to consider the prospects of success. If the period of delay is short and there is an unsatisfactory explanation but there are reasonable prospects of success, condonation should be granted. However,

[31] See *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* [2000] ZACC 3; 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3 read with *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 20.

[32] *Brummer* above n 31.

[33] Id.

despite the presence of reasonable prospects of success, condonation may be refused where the delay is excessive, the explanation is non-existent and granting condonation would prejudice the other party. As a general proposition the various factors are not individually decisive but should all be taken into account to arrive at a conclusion as to what is in the interests of justice.

[52] Although the main judgment includes the prospects of success among the factors to be taken into account, it does not say whether there are reasonable prospects of success in favour of the respondents, nor does it take this factor into account in its assessment of whether it is in the interests of justice to grant or refuse condonation.

[53] The main judgment does not take into account that there are at least four factors which favour granting condonation to the respondents. These are:

(a) the existence of reasonable prospects of success;

(b) the importance of the issue raised by the matter;

(c) the absence of prejudice to the applicant; and

(d) the fact that the periods of delay (ie 15 court days in one case and 30 court days in the other) are not excessive.

[54] In my view the main judgment should have taken these factors into account in its assessment of whether it is in the interests of justice to grant or refuse condonation. Furthermore, there are two decisions of this Court, which I discuss below, that support the granting of condonation which are not considered in the main judgment. In my

respectful view the main judgment unduly focuses on the inadequacy of the explanation for the delay and ignores other important factors that are normally taken into account in considering condonation applications.

Non-compliance with directions

[55] There are two areas of non-compliance for which the respondents applied for condonation. The one is the respondents' failure to lodge their answering affidavit timeously. The other is the respondents' failure to lodge their written submissions timeously. I deal with them in turn.

Late delivery of the respondents' written submissions

[56] The respondents' written submissions were late by 15 court days and were filed six days before the date of hearing. The explanation given is that the attorney handling the matter in the State Attorney's office forgot to diarise the file. It appears that at some stage that attorney and counsel whom she had brought into the matter thought that the respondents should not oppose the matter. It would appear that they sought the first respondent's approval without success. This was despite the fact that the respondents had been successful in all the courts below. I accept that this is not an adequate explanation for the delay.

[57] In *Geldenhuys*[34] the written submissions of the Minister of Justice and Constitutional Development were delivered more than three weeks after the due date

[34] *Geldenhuys v National Director of Public Prosecutions and Others* [2008] ZACC 21; 2009 (2) SA 310 (CC); 2009 (5) BCLR 435 (CC).

and only two days before the hearing. In that case this Court held that, although the explanation for the delay was inadequate, no party had suggested that it had suffered any prejudice and the proceedings were confirmatory proceedings in which the presence of the Minister was required.[35] In my view the present applicant failed to show that there would be any prejudice if condonation were granted. It would be desirable that the respondents participate in this matter because of the importance of the issue raised by the matter and the many public servants affected by the provisions which this Court is called upon to interpret and apply.

[58] In *NEHAWU v UCT*[36] this Court noted that the Judges of the Labour Court and Labour Appeal Court, in that and other matters, were divided on the correct interpretation of section 197 of the Labour Relations Act[37] (LRA). This Court regarded this as a prima facie indication that NEHAWU had reasonable prospects of success for purposes of determining whether it was in the interests of justice to grant it leave to appeal.[38] In other words the fact that a certain number of Judges from those courts had taken the same view as NEHAWU on the interpretation of section 197 of the LRA was regarded as prima facie indicative of the existence of reasonable prospects of success for NEHAWU.[39] An even stronger view was expressed along these lines by Jafta J[40] in *Aviation Union*[41] when he said: "The divergent views

[35] Id at para 21.

[36] *National Education Health and Allied Workers Union v University of Cape Town and Others* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*NEHAWU v UCT*).

[37] 66 of 1995.

[38] *NEHAWU v UCT* above n 36 at para 26.

[39] Id.

[40] Moseneke DCJ, Mogoeng J, Mthiyane AJ and Nkabinde J concurred.

expressed by the Supreme Court of Appeal in the two judgments and the views expressed in the judgments of the Labour Appeal Court show prospects of success."[42] The same approach applies to condonation applications because this Court has said that condonation applications must be decided on the same basis as applications for leave to appeal.[43]

[59] In the present case all six Judges who have dealt with this matter in the Labour Court, the Labour Appeal Court and the Supreme Court of Appeal found in the respondents' favour that the provisions of section 17(5) were triggered and resulted in the applicant's discharge from service by operation of law.[44] Accordingly, in this matter we must decide the condonation application on the basis that the respondents have reasonable prospects of success. This counts in favour of granting condonation. It must be remembered that this Court has rightly held that the presence of prospects of success is an important consideration in deciding whether to grant or refuse condonation.[45]

[60] In *Geldenhuys* this Court granted condonation.[46] In the present matter the respondents' application for condonation of the late delivery of their written

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[41] *Aviation Union of South Africa and Another v South African Airways (Pty) Ltd and Others* [2011] ZACC 39; 2012 (1) SA 321 (CC); 2012 (2) BCLR 117 (CC) (*Aviation Union*).

[42] Id at para 32.

[43] *Brummer* above n 31.

[44] It is six Judges because in the Labour Court the matter came before a single Judge and in the Labour Appeal Court the matter came before three Judges and the application for leave to appeal to the Supreme Court of Appeal was dealt with by two Judges of Appeal.

[45] *Brummer* above n 31 at para 3.

[46] *Geldenhuys* above n 34 at para 21.

submissions is very similar to that in *Geldenhuys*. If any importance is to be attached to this Court's precedent in that case, the respondents' fate should be the same as that of the respondents in *Geldenhuys.* Accordingly, I am of the view that condonation should be granted in the present case as well. I now proceed to consider the late delivery of the respondents' answering affidavit.

Late delivery of the respondents' answering affidavit

[61] The respondents' answering affidavit was late by about six weeks. That period is not excessive. Accordingly, this must be a factor in favour of the granting of condonation.

[62] In *Shilubana*[47] the applicants lodged their application for leave to appeal more than a month after the due date in terms of the Rules of this Court.[48] In the judgment it is not indicated by how much longer than a month it was lodged. In this case the period is two weeks longer than a month. *Shilubana* may have been a few days later than a month or a week or so longer than a month or more than two weeks longer than a month. I think that such difference as there might be in the period of delay between the present matter and *Shilubana* is unlikely to be material.

[47] *Shilubana and Others v Nwamitwa* [2008] ZACC 9; 2009 (2) SA 66 (CC); 2008 (9) BCLR 914 (CC) (*Shilubana*).

[48] Id at para 8.

[63] After stating the period of delay in *Shilubana*, all this Court said, through Van der Westhuizen J, in regard to the applicants' application for condonation was this:

> "This matter raises fundamental questions regarding the interplay between customary law and the Constitution. How these questions are resolved might be of paramount importance not only to the immediate parties, but to the community of which they are a part, as well as the nation. Accordingly the applicants' request for condonation must be granted."[49]

[64] The reason articulated by this Court in *Shilubana* for granting condonation was the possible importance of the issues raised by the matter not only to the parties but also to their community and the nation. The Court said nothing about whether any explanation was given for the delay. It also did not say anything about the applicants' prospects of success, prejudice to the respondents or the impact of the delay on the administration of justice. I would say that this Court must have regarded the delay of over a month as short for it to have dealt with condonation in the manner in which it did. That is without considering other relevant factors. In my view, if it had regarded a month as an excessive period of delay, it would have considered other relevant factors as well. Although in *Shilubana* this Court did not mention the existence of the prospects of success as one of the factors it took into account in granting condonation, the result in that case did show that there were reasonable prospects of success. However, the fact that the prospects of success were not given as one of the factors considered gives the impression that it was not considered.

[49] Id.

[65] As I have said, if one compares *Shilubana* with the present matter the period of delay in both matters is unlikely to have been materially different. In the present matter there is an explanation given for the delay whereas in *Shilubana* no explanation whatsoever seems to have been given; the appeal sought to be pursued in *Shilubana* raised a matter of importance; in the present matter the correct interpretation and application of section 17(5) of the Act which are raised by this matter is also a matter of importance; in *Shilubana* the Court had regard to the fact that the matter was important not only to the parties but also to the community of which the applicants were members and the nation; in the present matter the issues of the correct interpretation and application of the provisions of section 17(5) are important not only to the parties but also to hundreds of thousands of public servants in this country; in *Shilubana* the existence of reasonable prospects of success was not mentioned as one of the factors taken into account in deciding to grant condonation; in the present matter there are reasonable prospects of success for the respondents. In the light of what this Court said in *NEHAWU v UCT* as indicated above, in my view the main judgment ought to have approached the respondents' condonation application on the basis that there are reasonable prospects of success in favour of the respondents.

Prejudice and importance of the issues

[66] The applicant will suffer no prejudice whatsoever if the respondents are granted condonation. This is so because the applicant has to pursue his appeal before this

Court irrespective of whether or not we grant the respondents condonation. I have already discussed the importance of the issues raised by the matter.

[67] I accept that in condonation applications it is difficult to find two cases that have the same facts. Nevertheless, I do not think that this relieves this Court of its obligation to seek to ensure that, as far as possible, its jurisprudence on condonation is consistent. *Geldenhuys* and *Shilubana* provide clear examples of cases that are sufficiently close to the present case to require this Court to grant condonation.

[68] In the result I conclude that the respondents' failure to deliver their written submissions timeously should be dealt with consistently with how this Court dealt with the failure to deliver written submissions in *Geldenhuys* and condonation should be granted. I also conclude that the respondents' failure to deliver their answering affidavit timeously should be condoned.

For the Applicant:	Mr D Grootboom.
For the First and Second Respondents:	Advocate V Soni SC and Advocate S Poswa-Lerotholi instructed by the State Attorney.