IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA17/2021

In the matter between:

EKURHULENI METROPOLITAN MUNICIPALITY	**Appellant**
and	
SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL	**First Respondent**
M M LEGODI N.O.	**Second Respondent**
J MABETOA	**Third Respondent**

Heard: **9 November 2021**

Delivered: **27 January 2022**

Coram: **Davis JA, Savage and Kubushi AJJA**

JUDGMENT

SAVAGE AJA

Introduction

[1] It has previously been stated by our courts that our constitutional democracy is founded on the explicit values of human dignity and the achievement of equality in a non-racial, non-sexist society which operates under the rule of law.[1] Central to this vision is the hope that our Constitution will have us re-imagine power relations in our society so as to achieve substantive equality, more so for those who have suffered or continue to suffer unfair discrimination.[2]

[2] Sexual harassment is, at its core, concerned with the exercise of power and reflects the power relations that exist both in society generally and specifically within a particular workplace.[3] In the workplace, such harassment creates an offensive and very often intimidating work environment that undermines the dignity, privacy and integrity of the victim and creates a barrier to substantive workplace equality.[4] Where such harassment occurs at the hands of public officials who are enjoined to treat members of the public with respect and dignity,[5] it offends not only against the constitutionally entrenched right to dignity, privacy and integrity but against the basic values and principles that govern the public administration.[6] The result is that public services are accessed by members of the public in an environment which is hostile, intimidating and offensive.

[3] Both the 1998 Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace (the 1998 Code), issued by National and Economic Development and Labour Council (NEDLAC) under section 203(1) of the Labour Relations Act 66 of 1995 ('the LRA'), and the subsequent 2005 Amended Code on the Handling of Sexual Harassment Cases in the Workplace (the Amended Code), issued by the Minister of Labour in terms of s54(1)(b) of the Employment

[1] Section 1(a) to (c) of the Constitution of the Republic of South Africa, 1996.
[2] *Campbell Scientific Africa v Simmers* ('*Campbell*') [2015] ZALAC 51; (2016) 37 ILJ 116 (LAC); [2016] 1 BLLR 1 (LAC) at para 18 with reference to *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC); [2014] 11 BLLR 1025 (CC); 2014 (10) BCLR 1195 (CC); (2014) 35 ILJ 2981 (CC) at para 29
[3] *Campbell (supra)* at para 20
[4] *Campbell* (supra) at para 21; *Motsamai v Everite Building Products (Pty) Ltd* [2011] 2 BLLR 144 (LAC) at para 20. See too *Department of Labour v General Public Service Sectoral Bargaining Council and Others* (2010) 31 ILJ 1313 (LAC) at para 37.
[5] Section 195(1) of the Constitution. *Koyabe and Others v Minister for Home Affairs and Others* [2009] ZACC 23; 2009 (12) BCLR 1192 (CC) ; 2010 (4) SA 327 (CC) at para 62. See too
[6] Section 195(1) the Constitution.

Equity Act 55 of 1998[7] provide that victims of sexual harassment may include not only employees, but also clients, suppliers, contractors and others having dealings with a business.[8] It follows that the 1998 and Amended Code apply to members of the public who access public services.

[4] This appeal, with the leave of the Labour Court, is against the judgment and orders of that Court (per Mathebula AJ) delivered on 1 June 2020 in terms of which the review application brought by the appellant, the Ekurhuleni Metropolitan Municipality, was dismissed and the cross-review of the third respondent, Mr Justinus Mabetoa, was granted, with the late filing of such cross-review condoned. The result was that the arbitration award issued by the first respondent, the South African Local Government Bargaining Council ('the SALGBC'), was set aside on review and substituted with a finding that the dismissal of the third respondent was substantively unfair. It was consequently ordered that the third respondent be reinstated into his employment with the appellant, with the appellant ordered to pay the third respondent's costs.

Background and litigation history

[5] This appeal concerns two incidents of sexual harassment reported to the appellant by the complainant, a member of the public, who had accessed public services at the appellant's Edenvale vehicle licensing centre. The complainant was employed at the time as a retentions clerk by Standard Bank. She attended at the licensing centre on 23 June 2015 to book a vehicle learner's licence test and returned on 31 August 2015 to take the test. On 31 August 2015, she reported to a supervisor employed by the appellant that the third respondent, an employee of the appellant, had sexually harassed her on both 23 June 2015 and again on 31 August 2015 at the licensing centre.

[7] GN 1367 of 1998 issued by NEDLAC in terms of s 203 of the LRA; and GN 1357 of 2005 issued by the Minister of Labour in terms of s 54(1)(b) of the EEA (4 August 2005). See para 1 of the 1998 Code; para 4 of the Amended Code. The "Amended" Code does not replace or supersede the 1998 Code, which to date has not been withdrawn. In terms of section 203(3) of the LRA, both Codes therefore remain "relevant codes of good practice".

[8] Para 2.1 of 1998 Code and para 2.1 of the Amended Code.

[6] The complainant recorded in a statement signed on 31 August 2015 that on 23 June 2015 when she booked the learner's licence test the third respondent was the cashier who took her money and that he -

> '…forced to take my number on my details and I told him not to call. He made sexual remarks that I look like I taste nice in bed. I decided to ignore this event.'

[7] The third respondent did not call her. When she returned to the licensing centre on 31 August 2015 to take her learner's licence test, the third respondent was the official who signed the certificate and took her fingerprints. In her statement, she recorded that:

> 'He [the third respondent] made sexual remarks again, saying I look like I am nice in bed. He also looked at my address and said he will keep it in mind and come to my place. When I had to put my fingerprint on the learner's certificate he rubbed my hand in a very uncomfortable way. I took my certificate and went to reception to ask where do I go to lay a grievance and the lady at the door pushed me outside to tell me to let it go. I immediately went to the supervisor office…The supervisor called [the third respondent] and I confronted him and he denied all accusations. I then advised the supervisor that since he doesn't even apologise I would to lay (sic) a formal complaint. That is when he said he will apologise and I advised that the apology was to (sic) late and I would take matters further…'.

[8] At an internal disciplinary hearing, the third respondent was found to have committed two counts of sexual harassment. Although he denied the allegations the chairperson found it "*difficult to disregard*" the testimonies of the appellant's three witnesses. It was found that the third respondent had failed to maintain the professional client relationship, with two separate incidents of sexual harassment having taken place which warranted his dismissal. The third respondent was consequently dismissed from his employment with the appellant with effect from 31 March 2016.

Arbitration award

[9] Aggrieved with his dismissal, the third respondent referred an unfair dismissal dispute to the SALGBC. The complainant testified at the arbitration hearing that when she paid for her learner's licence test on 23 June 2015, the third respondent looked at her cellphone number and said "*that he would write it down so he could phone me*". She told him not to phone her. He then "*made sexual remarks*" to her "*that I look nice in bed, or it is nice in bed*". She stated that she was shocked, did not know what to say or do and left the licensing centre without reporting the matter.

[10] The complainant testified that on 31 August 2015 she returned to the licensing centre to take her learner's licence test. After passing the test, the third respondent took her fingerprints and signed her learner's licence certificate. When taking her fingerprints "he rubbed my hand in the way that was not comfortable, was not in the right manner" and caressed her hand. She testified that when he signed her certificate, the third respondent said: "I look like I am nice in bed". He looked at her address and said he will keep it in mind and come to her place. After this the complainant said she "just didn't feel safe", felt that the third respondent had "removed all dignity I had" and that she felt "scared at the same time". She could not understand why the third respondent, who was an older man, would talk to her in the way he did and without respect and it left her with a bad impression of the appellant's licensing department. After the incidents, she underwent counselling and found it hard to go to a driving school as most were run by older men who she was scared to be alone with.

[11] The substance of the complainant's evidence remained unchallenged at arbitration. While issue was taken with the lack of corroboration for her version, in cross-examination it was not put to the complainant that the third respondent denied that he had sexually harassed her.

[12] The appellant's regional manager for the licensing and transport division stated that all officials are required to treat customers with dignity and respect, that the appellant's reputation was at risk as a result of the third respondent's conduct

and that as a result of his conduct the trust relationship between the appellant and the third respondent had broken down irretrievably.

[13] In his evidence at arbitration, the third respondent denied that he had sexually harassed the complainant and said that he "can't apologise for something I never done (sic)". He took issue with the fact that while there was a camera behind him when he took the complainant's fingerprints, no recording was provided to him. In cross-examination it was put to him that -

> '…The complainant says that on the 23rd of June you said to her something to the effect that, you will taste nice or you look nice in bed. Did you say that?'

To this he replied:

> 'Umm no I said that.'

[14] When asked thereafter:

> 'On 31 August did you say that to her?'

The third respondent replied:

> 'Umm no I said that'.

[15] The arbitrator accepted the complainant's explanation for not reporting the matter after the first incident on the basis that she was "in shock" and "wanted to get out of the place as soon as possible". The evidence of the complainant and the third respondent as single witnesses was approached with caution. The arbitrator stated that consideration was had to whether the complainant was "a liar" with "an agenda against the applicant". However, having analysed the evidence, it was found probable that the third respondent had committed the misconduct alleged in that he had made improper remarks to the complainant which had had a sexual connotation and touched her hand in an inappropriate manner which had caused her discomfort.

[16] As to sanction, since the third respondent had worked for the appellant for over 10 years and had a clean disciplinary record, although the utterances made and the inappropriate touching of the complainant were found to have been of a

serious nature, the arbitrator took the view that the sanction of dismissal imposed was too harsh. As a result, the third respondent's dismissal was found to be substantively unfair and the dismissal imposed was replaced with a final written warning.

Judgment of the Labour Court

[17] Dissatisfied with the outcome of the arbitration, in particular the reinstatement of the third respondent, the appellant sought the review of the arbitration award in the Labour Court. The third respondent filed a cross-review for which condonation was sought on the basis that the application was 12 days from the date on which the appellant had complied with Labour Court rule 7A(8) and that the importance of the matter and prospects of success favoured the delay being condoned. In addition, the third respondent sought that the arbitration award be set aside and substituted with a finding that he had not sexually harassed the complainant, his dismissal was substantively unfair and that the final written warning imposed on him be set aside.

[18] The Labour Court found that the third respondent's cross-review application was to have been filed within 10 days of the appellant complying with rule 7A(8) and that the delay of 12 days after such period did not amount to an inordinate delay when inadequate papers having been filed by the appellant, for which the third respondent was not responsible, and that a number of public holidays had had a bearing on the conduct of business. The Court took the view that if condonation was not granted the third respondent stood to suffer prejudice in a matter that was of importance to both parties. For these reasons, the late filing of the application was condoned.

[19] As to the substance of the appellant's review application, the Labour Court noted that there were two conflicting accounts of the two incidents and that the complainant's version did "not make sense and barely constitutes evidence establishing guilt on the part of the third respondent". Issue was taken with the complainant's failure to report the incident on 23 June 2015 or disclose it to her family or friends. The Court found it "unthinkable that if the complainant was so shocked she will so easily let it slide and do nothing about it" and that she had

failed to accurately account for what was said to her, with her version not corroborated. The arbitrator failed to explore the probabilities and had not provided reasons for finding that the third respondent had made the remarks alleged, nor which version of what was said was probable and why. As to the incident on 31 August 2015, the Court noted that:

> 'Apparently this occurred…[when] despite the unpalatable past experience, the complainant approached the same person without reservations. This in my view is improbable that if the third respondent had behaved in the manner she found inappropriate, she would have allowed him to even touch her hand on the latter occasion.'

[20] The Court concluded that the arbitrator had committed a misdirection in finding that the misconduct had occurred when it was "startling that there is scarcity (sic) of explicit evidence about what transpired between them". Although the complainant subjectively concluded that the act of rubbing her hand was of a sexual nature, the objective facts were not considered. These included that the policy directive of the appellant required the manipulation of a hand to take fingerprints and that the complainant had failed to pull her hand away when the third respondent was rubbing it. It was found that the complainant's evidence should have been rejected, with the only logical conclusion being that the third respondent was not guilty of both charges. The Court concluded that the finding by the arbitrator to the contrary constituted an irregularity, as a result of which the appellant's application to review the arbitrator's award was dismissed and the cross-review was upheld. The appellant was ordered to pay the third respondent's costs in both the review and cross-review applications.

On appeal

[21] The appellant appeals against the judgment and orders of the Labour Court on the basis that the Court erred in finding that the third respondent's cross-review application was 12 days late when the arbitration award was published on 28 September 2015 and the application had in fact been filed seven months and 24 days late. The Court, it was averred, had therefore erred in granting the third respondent's application for condonation given such extensive delay. The appellant also contended that the Court had erred in finding that the evidence

did not support a finding that the third respondent had sexually harassed the complainant when his evidence was at neither credible nor reliable and he had admitted that he had make the sexual remarks alleged to her. In the circumstances, dismissal was the only reasonable sanction to be imposed when the third respondent showed no remorse for his conduct, had jeopardised the reputation of the appellant and the dignity and safety of a member of the public. As to costs, it was submitted that on the basis of law and fairness no costs order ought properly to have been imposed.

[22] In opposing the appeal, the third respondent conceded that a cross-review would have had to have been filed within six weeks of the arbitration award but that this does not detract from his *bona fides*, the strength of his case and the dictates of fairness and justice; and that the Labour Court was correct in granting condonation. This was so since the delay was caused by the difficulties that were experienced with the record filed by the appellant and the fact that there were a number of intervening public holidays. It was contended that if the application for condonation had not been granted a significant injustice would have resulted and that the Labour Court had therefore not erred in granting condonation.

[23] As to the merits of the matter, it was submitted that the Labour Court cannot be faulted for finding the complainant's version improbable given the frequent and significant discrepancies in her version and when the contention that the third respondent was guilty was far-fetched. Furthermore, it would have been impossible for the third respondent to take the complainant's fingerprints without holding the complainant's hand, there was no power dynamic of any relevance between the complainant and the third respondent, the complainant had failed to ask another official to assist her and there was no evidence of any similar complaints having been raised against the third respondent. As a result, the complaints raised were without foundation and the judgment of the Labour Court was correct.

Evaluation

[24] The task of the Labour Court on review is to determine, as was stated in *Sidumo & another v Rustenburg Platinum Mines Ltd & others (Sidumo)*,[9] whether the decision reached by the commissioner was one that a reasonable decision-maker could not reach.[10] In *Herholdt v Nedbank Ltd* (*Congress of South African Trade Unions as Amicus Curiae*), it was made clear that -

> 'For a defect in the conduct of the proceedings to have amounted to a gross irregularity as contemplated by Section 145(2)(a)(ii) [of the LRA], the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator.'[11]

[25] Although the arbitrator found the complainant's version to have been probable, the Labour Court rejected it as one that "did not make sense". This was despite the fact that, save for the claim that it was not corroborated, the veracity of the complainant's account was not challenged by the third respondent in cross-examination. This was an important failure given the obligations imposed upon the third respondent. As was made clear in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*:[12]

> 'The institution of cross-examination not only constitutes a right, it also imposes certain obligations. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness box, of giving any explanation open to the witness and of defending his or her character. If a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct. This

[9] [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC).
[10] At para 110.
[11] At para 25.
[12] [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (CC) at para 61.

rule was enunciated by the House of Lords in *Browne v Dunn*[13]and has been adopted and consistently followed by our courts.'[14]

[26] The third respondent failed to make it clear to the complainant in cross-examination the precise nature of the imputation raised, in the sense not only that her evidence was to be challenged but how this was to be done. It was not put to her that her version was false or that it was denied by the third respondent. The result was that she was not given the opportunity to respond to such a challenge, including to deny any suggestion as to the falsity of her version.[15]

[27] Furthermore, in his own evidence when asked whether he had said "something to the effect that, you will taste nice or you look nice in bed" to the complainant on 23 June 2015, the record clearly reflects that the third respondent admitted that he had. He also in evidence admitted having made the statements attributed to him on 31 August 2015. While the third respondent also denied making any sexual remarks to the complainant, that evidence considered together with the admissions made by him at least brought his credibility as a witness and the reliability of his account into question.

[28] While the third respondent on appeal took issue with the discrepancies in the complainant's account on the basis that she had recorded in her statement that on 23 June 2015 the third respondent had said that "I look like I taste nice in bed" but at arbitration testified that he had said "that I look nice in bed, or it is nice in bed", these discrepancies were not of such a nature as to warrant the wholesale rejection of her evidence. This was all the more so when her evidence clearly showed was that unwarranted remarks of a sexual nature had been made to her by the third respondent. It followed that on a conspectus of the material before the arbitrator, the finding that the third respondent had committed the misconduct alleged was supported by the evidence and the arbitrator's finding

[13] (1893) 6 The Reports 67 (HL).
[14] At para 61 with reference to *R v M* 1946 AD 1023 at 1028 per Davis AJA, Watermeyer CJ, Greenberg JA and Schreiner JA concurring; *Small v Smith* 1954 (3) SA 434 (SWA) at 438 E – H; *S v Govazela* 1987 (4) SA 297 (O) at 298J – 300B; *S v Van As* 1991 (2) SACR 74 (W) at 109 b – g; *Van Tonder v Killian NO en 'n Ander* 1992 (1) SA 67 (T) at 72I – 73A and, generally, Pretorius *Cross-examination in South African Law* (Butterworths, Durban 1997) and the authorities referred to there.
[15] SARFU at para 63 with reference to the authorities cited there.

to this effect fell within the ambit of reasonableness required. In finding differently the Labour Court erred.

[29] It would be remiss not to comment on the Labour Court's approach to the matter, more so given the constitutional imperatives which have guided the development by our courts of a different approach to treatment of matters such as this. In *McGregor v Public Health and Social Development Sectoral Bargaining Council,*[16] it was made clear that "today we hold in our hands a Constitution that equips us with the tools needed to protect the rights that are violated when sexual harassment occurs".

[30] The Labour Court failed to take heed of this sentiment. It approached the review application before it in the manner of an appeal, rejecting the complainant's version on the basis that it did "not make sense and barely constitutes evidence establishing guilt on the part of the third respondent", finding there to be a "scarcity of explicit evidence about what transpired" when the contrary was patently evident from the record. The Court took issue with the complainant's failure to report the matter on 23 June 2015, following the first incident, without regard to the subsequent steps taken by the complainant to report the matter and the reasons for her failure to do so initially. The Court took issue with the complainant's failure to choose an official other than the third respondent to assist her after the first incident, without regard to the fact that she was entitled to access public services without having her rights violated and that there was no obligation on her to seek out a different official to serve her in order to safeguard her rights. Furthermore, the Court discounted the complainant's evidence that the third respondent had inappropriately caressed her hand when taking her fingerprints, without regard to her clear evidence that he had, an assessment of her credibility as a witness, the reliability of her account or the probabilities, including why she would have sought to falsely implicate the third respondent when he was not known to her. In undertaking its task in the manner

[16] (2021) 42 ILJ 1643 (CC); [2021] 9 BLLR 861 (CC) at para 1.

that it did the Labour Court only further contributed to the indignity endured by the complainant in the matter.

[31] As to the issue of sanction, the appellant dismissed the third respondent for failing to maintain a professional client relationship and on the basis that he had been found to have committed two separate incidents of sexual harassment. In finding that the sanction of dismissal to have been too harsh and dismissal unfair, the arbitrator recognised the serious nature of the misconduct committed but relied on the third respondent's length of service and clean disciplinary record to substitute the sanction of dismissal with a final written warning.

[32] In *Sidumo* it was made clear that[17] -

> 'In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.'

[33] In undertaking this task, the arbitrator was required to have regard to the conspectus of the material presented at arbitration. This included, but was not limited to, the nature and seriousness of the misconduct, the importance of the rule, the extent of similarity between the employee's misconduct and other incidents of a similar nature, the consistent application of the rule by the appellant, the harm caused by the employee's conduct, his knowledge of and training about the rule, the reason the employer imposed a sanction of dismissal, the basis of the challenge to the dismissal, the employee's disciplinary record and relevant mitigating factors.[18]

[34] In *Campbell Scientific Africa,*[19] this Court stated that in the context of sexual harassment sanction serves an important purpose in that it "sends out an unequivocal message that employees who perpetrate sexual harassment do so

[17] [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) at para 79.
[18] See *Sidumo* at para 78.
[19] *Campbell Scientific Africa (Pty) Ltd v Simmers* [2015] ZALCCT 62; (2016) 37 ILJ 116 (LAC).

at their peril and should more often than not expect to face the harshest penalty".[20] Sexual harassment committed by an official employed in the public sector, in the course of the provision of public services to a member of the public, constitutes serious misconduct insofar as it amounts to an abuse of a public position of authority. Where such harassment is committed more than once and directed at the same member of the public this makes it all the more serious.

[35] There was no dispute that the third respondent had been aware of the rule and that such rule had been inconsistently applied by the appellant. The fact that he was employed to provide public services to members of the public and acted in a position of some authority over the complainant illustrated the seriousness of the misconduct and his abuse of his position. It was relevant that he did not unequivocally accept wrongdoing or express any remorse for his conduct. His period of service served both as a mitigating but also an aggravating factor given the serious nature and impact of his misconduct and his knowledge of the rule prohibiting it,[21] with neither his long service nor his unblemished disciplinary record lessening the gravity of his misconduct.[22] Furthermore, the evidence as to the harm caused by such misconduct was clear, with the complainant stating that it had had a negative impact on her life and that she had suffered psychologically as a result.

[36] In failing to balance all of these factors, but instead affording undue weight to some of them to the exclusion of others, the arbitrator arrived at a decision on sanction which was one that a reasonable decision-maker could not reach. The arbitrator was not given the power to consider the issue of sanction afresh, but was required to determine whether the sanction imposed by the appellant was fair. Had appropriate regard been had to all relevant considerations, the conspectus of material before the arbitrator would have been considered and the appellant's dismissal of the third respondent would have been found to be fair and an appropriate operational response to the serious misconduct committed by him. The Labour Court erred in failing on review to find as much

[20] At para 35. See also *Gaga v Anglo Platinum Ltd* [2011] ZALAC 29; (2012) 33 ILJ 329 (LAC) at para 48.
[21] *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA* [2014] 1 BLLR 20 (LAC).
[22] *Toyota SA Motors (Pty) Ltd v Radebe* (2000) 21 *ILJ* 340 (LAC) at paras 15–16.

and it follows that the appellant's appeal must succeed. The award of the arbitrator is therefore to be substituted with a finding that the dismissal of the third respondent by the appellant was substantively fair.

[37] There was no dispute between the parties that the Labour Court erred in its calculation of the extent of the third respondent's delay in filing his cross-review application. A cross-review is a self-standing application which must be brought within the six-week time limit provided in the LRA,[23] calculated from the date of the arbitration award and not the date on which the appellant complied with rule 7A(8). In failing to adopt the correct approach in this regard, the Labour Court erred. Since the arbitration award was published on 28 September 2016 and the third respondent brought his cross-review application on 4 May 2017, such application was seven months and 24 days late.

[38] As was made clear in *Steenkamp and Others v Edcon Limited*[24] condonation is to be granted if doing so would be in the interests of justice. It is not granted on the mere asking but following a full and reasonable explanation for the default. Where the delay is unacceptable and excessive, with no reasonable explanation which explains it, there may be no need to consider the prospects of success. In this matter the extensive delay in filing the cross-review, the reasons advanced for such delay and the third respondent's limited prospects of success do not indicate that it would have been in the interests of justice to grant condonation in relation to the late filing of the application to cross-review.

[39] For these reasons, the appeal must succeed. There is no reason in law or fairness why costs should be ordered against the third respondent either in the Labour Court or on appeal.

Order

[26] For these reasons, the following order is made:

1. The appeal is upheld.

[23] *SA Broadcasting Corporation Ltd v Grogan NO & Another* [2006] 27 ILJ 1519 (LC) at paras 15-16; *Jusayo v Mudau NO & others* [2008] 7 BLLR 668 (LC); *Makuse v CCMA* (2016) 37 ILJ 163 (LC).
[24] [2019] ZACC 17; 2019 (7) BCLR 926 (CC); (2019) 40 ILJ 1731 (CC); [2019] 11 BLLR 1189 (CC) at paras 35-37.

2. The order of the Labour Court is set aside and substituted as follows:

"1. *The applicant's review application succeeds*.

2. The award of the second respondent is reviewed, set aside and replaced as follows:

'The dismissal of the third respondent, Mr Justinus Mabetoa, is found to have been substantively fair.'

3. Condonation for the late filing of the cross-review is refused."

SAVAGE AJA

Davis JA and Kubushi AJA agree.

APPEARANCES:

FOR THE APPELLANT:	F A Boda SC and N E Nwedo Instructed by Salijee Du Plessis Van der Merwe Inc.
FOR THE THIRD RESPONDENT:	M Coetzee Instructed by Raymond Francois Hauptfleisch Inc.