

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 2657/2021

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

CIRCULATE TO MAGISTRATES: YES/NO

In the matter between:

**NATIONAL EMANCIPATED &
ALLIED WORKERS UNION OF
SOUTH AFRICA ("NEAWUSA")**

Applicant/First Respondent

And

**BOTHAVILLE MILLING (PTY) LTD t/a
HUSA MILLS**

Respondent/Applicant

In re:

In the matter between:

**BOTHAVILLE MILLING (PTY) LTD t/a
THUSA MILLS**

Applicant

And

**NATIONAL EMANCIPATED &
ALLIED WORKERS UNION OF
SOUTH AFRICA ("NEAWUSA")**

First Respondent

T LENEPA N.O.

Second Respondent

MOHAU ISAAC LENGOLA N.O.

Third Respondent

MOHLOLO BENJAMIN SETABELA N.O.

Fourth Respondent

ALL EMPLOYEES OF APPLICANT PRESENTLY INVOLVED IN INDUSTRIAL ACTION

Fifth Respondent

CORAM: VAN RHYN, J

HEARD ON: 9 JUNE 2023

DELIVERED ON: 15 JUNE 2023

[1] This is an application by National Emancipated & Allied Workers Union of South Africa "(NEAWUSA)", the first respondent in the main application, for condonation for the non-compliance with the provisions of Rule 49(1) (b) and an application for leave to appeal against the order handed down by this court on 9 February 2023. The application for condonation and leave to appeal are opposed by Bothaville Milling (Pty) LTD t/a Thuso Mills ("Thuso **Mills**"), the applicant in the main application.

[2] A similar application for condonation and leave to appeal was brought and heard simultaneously with this matter in Case Number 2721/2021 in the matter between LFC Milling (Pty) Ltd, the applicant in the main application and NEAWUSA being the first respondent. However, in Case number 2721/2021 the third to sixth respondents are different parties to those in the matter at hand. This judgment is intended to apply in respect of both applications, given that the facts and arguments on behalf of the parties are largely the same.

[3] In terms of the provision of Rule 49(1)(b) of the Uniform Rules of Court an application for leave to appeal shall be made within 15 days of date of the order or judgment appealed against. The 15-day period lapsed on 2 March 2023. The applications for leave to appeal were delivered to Thuso Mills's and LFC Milling's attorneys of record on 16 March 2023 and filed on 17 March 2023 together with the applications for condonation, some 26 days after the date of the order.

[4] Both applications for leave to appeal were enrolled for hearing by the respondents, Thuso Mills and LFC Milling. In the application for leave to appeal in the Thuso Mills matter, the grounds for the appeal are set out and can concisely be summarized as follows:

4.1. the court erred in finding that the notice of intention to bring an application to recover costs, enrolled for hearing on 9 February 2023 by Thuso Mills, was an application brought by NEAWUSA;

4.2. the court erred in not finding that the notice of intention to bring an application to recover costs did not constitute an application in terms of the provisions of Rule 6(4) and (5) of the Uniform Rules of Court;

4.3. The court erred in not finding that the notice of intention to bring an application to recover costs was in fact filed by Thuso Mills's attorney with the view of disguising the notice as an application allegedly brought by NEAWUSA;

4.4. The court erred in not finding that the contents of the notice indicated that it was not a notice of intention to bring an application but that it was a complaint lodged against Thuso Mills regarding monies which were taken from NEAWUSA's bank accounts in the name of legal costs which were not justified;

4.5. The court erred in not finding that NEAWUSA, as a juristic person are in law not allowed to file an application in its name without being represented by a legal practitioner and on this basis, the purported

application would in any event be defective.

[5] In the heads of Argument filed on behalf of NEAWUSA in the LFC Milling matter the contention is that this matter was not on the roll for 9 February 2023. The further grounds of appeal as set out in paragraph 4 above also apply to the LFC Milling matter. In the applications for condonation the deponent, Tsiliso Lenepa, the General Secretary of NEAWUSA, contends that, on receipt of the court order on 13 February 2023 it appeared as if the applications were dismissed against the applicant, being Thuso Mills and LFC Milling, and not against the first respondent being NEAWUSA. To the extent that both orders of 9 February 2023 did not specifically direct NEAWUSA to pay the costs, he was advised not to proceed with an application for leave to appeal. On 2 March 2023 Thuso Millis and LFC Milling delivered their Notices of Taxation and it then dawned upon the deponent that Thuso Mills and LFC Milling considered themselves to be the "respondent" in the applications that served before court on 9 February 2023.

[6] As a direct result of the delivery of the Notices of Taxation, NEAWUSA brought the applications for leave to appeal in both matters, which the applications for condonation seeks its late filing to be condoned. The deponent explains that he was out of office from 1 March 2023 until 10 March 2023 and was only able to "get in touch" with the legal representatives of NEAWUSA in Johannesburg on 14 March 2023 to provide the necessary instruction for the application for leave to appeal.

[7] On behalf of NEAWUSA it is submitted that the late delivery of the applications for leave to appeal was not intentional. On the grounds that Thuso Mills and LFC Milling filed vexatious and frivolous applications, being the Notice of Intention to bring an application to recover costs, as if it were applications by NEAWUSA, it was "dragged to court without cause" and NEAWUSA would be severely prejudiced in the event of condonation not being granted.

[8] Mr Louw, counsel on behalf of Thusa Mills and LFC Milling contends that NEAWUSA has yet again, in a further abuse of the court processes, applied for

leave to appeal outside the timeframe prescribed by Rule 49(1)(b). In the applications for condonation no mention is made of the fact that Mr Sebola, counsel on behalf of NEAWUSA, appeared in court on 9 February 2023 and subsequent to the order dismissing the applications in both matters with costs being delivered, Mr Sebola threatened to take various steps to challenge the court's pronouncement.

[9] Mr Louw argued that NEAWUSA therefore distorts the true facts with semantics and attempts to escape the consequences of Rule 49(1)(b) by stating that the taxation only came to its attention on 10 March 2023 and thus submits that is the date when the clock started ticking for the calculation of the 15- day time period to file an application for leave to appeal. The applications for condonation in respect of both matters are opposed on the grounds set out in the heads of argument filed by Mr Louw. It was argued that the applications for condonation do not meet the threshold required and that the explanation for the delay amounts to no explanation whatsoever.

[10] The salient facts pertaining to these matters are the following: On 10 June 2021 Thuso Mills and on 16 June 2021 LFC Milling, as applicants, brought urgent applications (the main applications) for two separate orders interdicting and restraining the respondents in the said matters, during protest or strike actions from committing unlawful conduct which constitutes a criminal act or violation of fundamental rights of individuals in the form of damage to property and assault in respect of the applicants, its management and third persons. In both matters a rule *nisi* was granted. The rule nisi orders were subsequently confirmed by Page AJ on 5 October 2021.

[11] The respondents in the main applications were ordered to pay the costs, jointly and severally. The respondents failed to pay the taxed costs of the two main applications where after the applicants issued writs for execution with notices in terms of the provisions of Rule 45(12)(a) to be served by the Sheriff upon Standard Bank and later also upon Absa Bank. NEAWUSA failed to make payment of the costs.

[12] In the meanwhile and in both applications, NEAWUSA filed applications for leave to appeal, which were dismissed. Thereafter NEAWUSA filed applications for leave to appeal to the Supreme Court of Appeal and condonation which applications were dismissed by the Supreme Court of Appeal. In both matters NEAWUSA then filed applications for leave to appeal in the Constitutional Court which are currently pending.

[13] The Sheriff received payments from Standard Bank and Absa Bank in respect of both main applications in the amount of R 185 042.25. On 2 August 2022 the movable assets of NEAWUSA were sold by the Sheriff which yielded a net amount of R3 823.70. The costs recovered from the said bank accounts held by NEAWUSA and the sale in execution failed to cover the taxed costs owed to the applicants in respect of both applications.

[14] On 29 September 2022 at 15h55 a "Notice of Intention to bring an Application to Recover Costs" in Case number 2657/2021 was delivered to the attorneys of record acting on behalf of Thusa Mills being Symington & De Kok Attorneys, Bloemfontein. Simultaneously, a similar notice was delivered in Case Number 2721/2021. On 13 October 2022 LFC Milling and Thusa Mills delivered their notices of intention to oppose these applications and on 2 November 2022 they filed their opposing affidavits in respect of both applications. No replying affidavits were filed and these applications were enrolled by LFC Milling and Thusa Mills to be heard on 1 December 2022.

[15] On 1 December 2022 Boonzaaier AJ granted the following order in both applications:

- "1. The matter is postponed to 9 February 2023;
2. The second applicant shall obtain legal representation and file replying affidavit and heads timeously;
3. Costs shall stand over to be argued on 9 February 2023."

[16] It is apposite to mention that in both the applications to recover costs, the same heading and case numbers were used as per the initial main applications. LFC Milling and Thusa Mills appeared as applicants and NEAWUSA and the other parties as respondents. This evidently created numerous problems when the subsequent orders were issued in respect of both applications. However, the applicant in the applications to recover costs is NEAWUSA. It is obvious that Boonzaaier AJ referred to T Lenepa N.O. (the second respondent in both applications) who, as placed on record by Mr Louw, appeared in court before Boonzaaier AJ, as the "second applicant".

[17] On 9 February 2023 both applications were on the unopposed motion court roll following the postponement thereof by Boonzaaier AJ on 1 December 2022. Mr Sebola appeared on behalf of NEAWUSA and Mr Louw appeared on behalf of Thusa Milling and LFC Milling. Subsequent to hearing arguments on behalf of the parties, Mr Louw specifically requested orders in respect of both matters for the dismissal of the applications for the recovery of costs, with costs. In both applications such orders were granted.

[18] It appeared that the orders issued by this court on 9 February 2023 in both applications, contained an ambiguity, error or omission in that the orders granted in court and the typed orders reflected that the "application is dismissed with costs" while the orders should have read that the application in both matters by the "first respondent" is dismissed with costs. On 21 April 2023 the orders in both matters were varied in terms of the provisions of Rule 42(1)(b) to read as such.

[19] In **Melane v Santam Insurance Co Ltd**¹ the court in dealing with the issue of whether or not sufficient cause had been shown for condonation for the non-compliance with the court rules of a petition that was late held as follows:

"In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a

¹ 1962 (4) SA 531 (A).

consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these factors are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective *conspectus* of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked."²

[20] What is completely absent from the explanation provided by NEAWUSA is the particularity as to what occurred from 9 February 2023, when counsel represented NEAWUSA in court when the orders were delivered in both matters, until 2 March 2023 and in the period from 10 March 2023 until 14 March 2023. Mr Louw referred to **Mnyandu and others v Engineering Utilities and Installations Eastern Cape (Pty) Ltd and others**³ and argued that the facts of the **Mnyandu-case** has striking similarities to the matters at hand. The applicants in the **Mnyandu** matter were legally represented in court on the day Maya J (as she then was) discharged interim relief with costs. A while after expiry of the 15-day period the applicants sought condonation and leave to appeal against the order. The explanation for the delay was that the attorney initially had no instructions. Later they learnt that the respondents were taking steps to tax a bill of costs against them. Only then were the applicants "...galvanized into action by the threatened bill of costs and had not otherwise intended to contest the order. This explanation is, in my view, far from satisfactory."

[21] NEAWUSA does not allege that it was not informed about the orders

² Melane v Santam Insurance (*supra*) at 532 C-F.

³ [2001] JOL 9216 (Tk).

granted on 9 February 2023. It is evident that NEAWUSA did not contemplate any application for leave to appeal until such time as the bill of costs in both matters were received. This court has a discretion in granting condonation upon exercising same judiciously. An application for condonation is not a mere formality. The test is whether it is in the interests of justice to grant condonation. I am not convinced that NEAWUSA showed sufficient cause warranting the exercise of this court's discretion condoning the late lodging of the application for leave to appeal

[22] In respect of the prospects of success of appeal, Mr Sebola argued that there was no application before the court on 9 February 2023. The process that served before the court was merely a "complaint" served upon Thuso Mills and LFC Milling to notify them of an intention to bring an application to recover costs. On behalf of NEAWUSA it was argued that the "complaint" before court did not comply with the provisions of rules 6(4) and 6(5)(a) in that such applications must be brought on notice of motion as near as may be in accordance with Form 2(a) of the First Schedule and true copies of the notice, and all annexures thereto, must be served upon every party to whom notice thereof is to be given.

[23] I agree with the submissions by Mr Louw that Mr Sebola refrained from dealing with the provisions of Rule 6(11) regarding interlocutory and other applications incidental to pending proceedings which may be brought on notice supported by such affidavits as the case may require. Given the pending appeals, the issue of costs remained pending and was incidental to the applications in respect whereof the appeal had been lodged. When Mr Lenepa appeared on 1 December 2022 he indicated to the court that NEAWUSA wished to file a replying affidavit in respect of both matters and therefore requested a postponement. The postponement and leave to file a replying affidavit was granted by Boonzaaier AJ. However, no replying affidavits were filed.

[24] The applications by NEAWUSA are fatally defective because it is not supported by an affidavit as to the facts upon which the applicants rely for the relief and contains various other fatalities and defects. Notwithstanding the fact that the applications delivered upon Thuso Mills and LFC Milling were defective, they were

entitled to file their answering affidavits in opposition to the relief claimed by NEAWUSA.

[25] The legislation dealing with the circumstances upon which leave to appeal may be granted is set out in section 17(1) of the Superior Courts Act 10 of 2013 which provides as follows:

"Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a)(i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration: [Emphasis added]

[26] In applications of this nature, the test which was applied previously, was whether there were reasonable prospects that another court "*may*" come to a different conclusion.⁴ What emerges from section 17(1) is that the threshold to grant a party leave to appeal has been raised. It is now only granted in the circumstances set out and is deduced from the words '*only*' used in the said section.⁵

[27] I have seriously considered the submissions made on behalf of the parties, reconsidered the applications that served before me on 9 February 2023 and the orders granted and have come to the conclusion that the arguments raised on behalf of NEAWUSA are without merit. I have taken into consideration the reasons for the delay in bringing the application for leave to appeal and I have considered whether the appeal would have reasonable prospects of success. I am convinced that, there being no true reasonable explanation for the delay and the lack of reasonable prospects of success, leave to appeal should be refused.

⁴ Commissioner of Inland Revenue v Tuck 1989 (4) SA 888 (T) at 890.

⁵ The Mont Chevaux Trust v Tina Goosen & 18 Others 2014 JDR 2325 (LCC) at para [6].

[28] I therefore make the following orders in respect of Case number 2657/2021 and Case number 2721/2021:

1. The application for leave to appeal is dismissed with costs.

VAN RHYN, J

Counsel for the Applicant:

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Instructed by:

NEAWUSA

Bloemfontein

Counsel for Respondent:

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