

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JA111/2022

In the matter between:

MOTLATSI LEKHESA

Appellant

In re:

ZANELE ZIPHELELE NGWENYA

Applicant

and

**TRUSTEES FOR THE TIME BEING OF SISHEN
IRON ORE COMPANY COMMUNITY DEVELOPMENT
TRUST**

First Respondent

VUSANI MALIE

Second Respondent

Heard: 22 February 2024

Delivered: 26 March 2024

Coram: Savage ADJP, Musi JA and Van Niekerk JA

JUDGMENT

SAVAGE, ADJP

Introduction

[1] This appeal, with the leave of this Court, is against the judgment and order of the Labour Court (per Moshoana J) in which costs *de bonis propriis* on an

attorney and own client scale were ordered against the appellant, Mr Motlatsi Lekhesa, or his law firm, Lekhesa Attorneys Incorporated.

- [2] Mr Zanele Ziphelele Ngwenya, the applicant before the Labour Court, was employed from 1 October 2014 as Chief Financial Officer of the first respondent, the Sishen Iron Ore Company Community Development Trust (Trust). Following his suspension by the Trust, represented by his attorney, Mr Lekhesa of Lekhesa Attorneys Incorporated, the applicant launched urgent proceedings in the Labour Court to interdict his impending disciplinary hearing on the basis that such proceedings were unlawful as he was a whistleblower who had made a protected disclosure.
- [3] Prior to the hearing of the urgent application, the Trust's attorneys, Cheadle Thompson & Haysom, wrote to the appellant to indicate that the application to interdict the disciplinary hearing had no prospects of success, that it would amount to frivolous litigation and that should the applicant persist with the application, it would be opposed and costs on an attorney and own client scale sought. The applicant persisted with the application, which the Labour Court on 8 October 2018 struck from the roll for lack of urgency. The pre-dismissal arbitration hearing, held in terms of section 188A of the Labour Relations Act¹ (LRA), proceeded on 15 October 2018 and the applicant was dismissed from his employment with the Trust on 21 January 2019. Thereafter, an application to review the arbitration was launched by the applicant in the Labour Court in 2019 but the application lapsed due to the applicant's failure to prosecute the matter.
- [4] The applicant thereafter re-enrolled the urgent application, which had previously been struck from the roll, for hearing on 14 October 2020. On 19 June 2020, the Trust's attorneys wrote to the applicant, through the appellant as his attorney, asking that the application be withdrawn to save costs on the basis that it was moot and that the relief sought would have no practical effect. No response was received to this email. On 6 October 2020, the

¹ Act 66 of 1995, as amended.

Trust's attorneys sent a further email to the appellant. The appellant responded that the matter was before the Labour Court which would rule on the matter. The Trust's attorneys indicated that the issue of mootness would be argued and a punitive costs order sought against the appellant and his firm. At the hearing of the matter on 14 October 2020, the appellant sought that the application be postponed to allow the applicant to amend his papers. The matter was postponed *sine die* by Mabaso AJ.

- [5] On 10 November 2020, the Trust's attorneys received a notice of motion under the same 2018 case number under which the first urgent application had been brought, together with an "amended" founding affidavit in which the Trust was called upon to dispatch a record of proceedings with reasons. In this amended notice of motion, the applicant sought to bring a claim under s 77(3) of the Basic Conditions of Employment Act² (BCEA). No contract of employment was put up in support of the proposed amendment, nor was any term of such contract pleaded as the basis on which reliance was placed on section 77(3).
- [6] On 19 November 2020, the Trust's attorneys wrote to the appellant indicating that the notice of motion disclosed a new cause of action and ought to have been filed under a new case number. In addition, the call to dispatch a record and reasons was queried and the appellant was advised that the filing of such papers amounted to an irregular step and that no notice of intention to amend had been filed. The Trust's attorneys requested that the application be withdrawn to save costs. On 26 November 2020, a notice to amend was filed and on 7 December 2020, the Trust's attorneys requested the appellant to withdraw the application failing which costs *de bonis propriis* would be sought against him. No response was received to this email.
- [7] The matter was enrolled for hearing on 2 March 2022, on which date Moshwana J dismissed the application and in an *ex tempore* judgment gave the appellant 14 days to show cause why costs *de bonis propriis* should not

² Act 75 of 1997.

be ordered against him or his law firm. In his affidavit filed on 13 July 2022, the appellant stated that on 14 October 2020, the Labour Court had given the applicant permission to amend his application to bring it under section 77(3), that “(t)he respondents did not oppose the application”, that the applicant was ordered to pay costs and that “the applicant amended his application”. The appellant stated that he and the applicant’s counsel had advised the applicant to approach the Court on this basis.

- [8] On 17 August 2022, the Labour Court ordered that the appellant “or his firm” pay the Trust’s costs on an attorney and own client scale on the basis that a hopeless case had been pursued without regard to the law or the facts and that the appellant had misled the Labour Court by stating that the amendment application had been granted when it had not. This appeal is against the costs order made.

Application for condonation and reinstatement

- [9] At the outset of the hearing of this appeal, the appellant sought an order condoning his 31-day delay in filing the notice of appeal. In addition, he sought an order reinstating the appeal and condoning the late filing of the appeal record. This followed the appeal having been deemed to have been withdrawn due to the record not having been filed within the time periods provided in terms of rules 5(17)³ and 5(19) of the Labour Appeal Court Rules,⁴ with no extension of the period within which to do so having been granted by the Judge President.

- [10] The appeal record was filed 47 days late by the appellant. A defective record was initially filed 22 days late, with a complete record only filed 25 days thereafter, on 24 July 2023. However, in his application for condonation and

³ GN 1665 of 1996: Rules Regulating the Conduct of Proceedings in the Labour Appeal Court. Rule 5(8) states: “The record must be delivered within 60 days of the date of the order granting leave to appeal, unless the appeal is noted after a successful petition for leave to appeal, in which case the record must be delivered within the period fixed by the court under rule 4(9)”.

⁴ Rule 5(19) states: “If the respondent delivers a notice of intention to prosecute a cross-appeal, the respondent is for the purposes of subrule (8) deemed to be the appellant, and the period prescribed in subrule (8) must be calculated as from the date on which the appellant withdrew the appeal or on which the appeal was deemed to have been withdrawn”.

reinstatement of the appeal, the appellant sought condonation only for the first 22-day delay, and not for the additional 25-day period.

[11] The appellant explained the reasons for his delay in filing both the notice of appeal and the record of appeal. The first of these was that the respondents failed to file a response to the notice of appeal which he claimed delayed him in filing the appeal record. This is in spite of the fact that there is no requirement that such a response be filed by the respondents. Further reasons advanced for the delay, all expressed in general terms and without detailed dates or supporting documentation put up, were that he suffered from ill health, having been hospitalised six times before being diagnosed in October 2020 as suffering from a possible chronic disease. Since then, the appellant stated, he has suffered anxiety and depression. In addition, his two children were ill at various times and had to be taken to hospital and his 80-year-old mother was also hospitalised. The appellant contended that no prejudice would be caused to the respondents if condonation were granted and the appeal reinstated. In addition, he stated, without more, that his prospects of success were good. In support of this averment in argument, he stated that he had acted on the advice of counsel in the matter and that even if an error had been made in the approach adopted, an order of costs *de bonis propriis* was harsh and unjustified.

[12] Both the Trust and the second respondent, Mr Vusani Malie, opposed the application for condonation and the reinstatement of the appeal. Since rule 5 of the Rules of this Court does not require a response to be filed by a respondent to a notice of appeal, the appellant was not entitled to rely on the period spent waiting for such a response to explain his delay. The respondents contended further that the personal circumstances advanced by the appellant, although not disputed, did not amount to a satisfactory explanation for the full period of delay. In addition, the appellant failed to explain why the Judge President was not approached in terms of rule 5(17) to seek consent for the late delivery of the record and why a condonation application for the full period of the delay had not been filed.

[13] As to the prospects of success, the respondents contended that a punitive costs order was made given that a hopeless case was pursued by the appellant and his firm and because the appellant had misled the Court on oath that an amendment to the pleadings had been granted by Mabaso AJ when it had not. The cautions sent to the appellant by the respondents' attorneys with regard to the lack of merits in the matter were ignored and the application to amend the applicant's papers under section 77(3) was ill-founded given that the appellant had already been dismissed, no contract of employment was put up and no cause of action was disclosed.

Evaluation

[14] The grant of condonation involves the exercise of a discretion, with a decision to condone a party's non-compliance with the rules of the court or directions constituting an indulgence granted by the Court.⁵ Such an application should be granted if, having regard to the particular circumstances of the matter, it is in the interests of justice to do so, and refused if it is not.⁶ To reach a decision, regard is to be had to factors including the nature of the relief sought, the extent and cause of the delay, the reasonableness of the explanation for the delay, the importance of the issue to be raised, issues of prejudice and the prospects of success. As a general proposition, the factors to be considered are not individually decisive of an application for condonation but are all considered to determine what is in the interests of justice.⁷

[15] The first difficulty that arises in relation to the appellant's application for condonation is that he has failed to seek that the full period of his delay in filing the appeal record be condoned, with the application made only in respect of the first 22-day delay and not the additional 25 days. Even if it were to be, somewhat leniently, considered that the application made included that the additional period of delay be condoned, the appellant has failed to explain the reasons for the further delay which arose. The reasons advanced for the

⁵ See *Steenkamp and Others v Edcon Limited* [2019] ZACC 17; (2019) 40 ILJ 1731 (CC) (*Steenkamp*) at para 26.

⁶ *Steenkamp supra*; *Grootboom v National Prosecuting Authority* [2013] ZACC 37; 2014 (2) SA 68 (CC) (*Grootboom*) at paras 22 - 23 and 51.

⁷ *Grootboom supra* at paras 22-23 and 51.

delay in filing the notice of appeal and the first period of delay in filing the record amount to a general explanation of ill-health involving both the appellant and his family members, without a full and detailed explanation provided for the full extent of the period of delay, why it arose and why it was as significant a period as it was. Given that the Court's indulgence was sought, the appellant ought reasonably to have carefully explained the delay in sufficient detail, with any supporting documentation put up as was required to advance his case.

[16] Turning to prospects of success, the power of an appellate court to interfere with a discretion exercised by a High Court or the Labour Court, and the standard of interference to be applied, depends on whether the discretion exercised was a discretion in the true sense or whether it was a discretion in the loose sense.⁸ A true discretion, such as that exercised in relation to costs,⁹ is one in which a court has a wide range of equally permissible options available to it. An appeal court will not consider whether a true decision reached by the court of first instance was correct but will interfere only where the discretion has not been exercised judicially, is one influenced by wrong principles or misdirection on the facts, or has been reached when this could not reasonably have been done had the court properly directed itself to all the relevant facts and principles.¹⁰

[17] Punitive costs convey a court's displeasure at a party's reprehensible conduct¹¹ and are justified where the conduct concerned is extraordinary and deserving of a court's rebuke.¹² Additionally, an order of costs *de bonis propriis* is made against an attorney, as an officer of the court who owes a court an appropriate level of professionalism and courtesy, as a mark of the

⁸ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and another* [2015] ZACC 22; 2015 (5) SA 245 (CC) (*Trencon*) at para 83.

⁹ *Ibid* at para 85.

¹⁰ *Ibid* at para 88.

¹¹ *Ibid* at para 92.

¹² *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC) at para 226 citing *SS v VV-S* [2018] ZACC 5; 2018 (6) BCLR 671 (CC) at para 41 and *Ka Mtuze v Bytes Technology Group South Africa (Pty) Ltd and others* [2013] ZACC 31; 2013 (12) BCLR 1358 (CC) at para 3.

court's displeasure for the conduct of that practitioner.¹³ This occurs where a court is satisfied that there has been negligence to a serious degree, or a gross disregard for professional responsibilities, where an attorney acted inappropriately and egregiously, or where a legal practitioner misleads the court.¹⁴

- [18] The Labour Court awarded costs *de bonis propriis* against the appellant or his firm on a punitive attorney and own client scale for two reasons: that he had pursued a hopeless case without regard to the law or the facts; and had misled the Court that leave to amend had been granted, when it had not. To show that he holds reasonable prospects of success on appeal, the appellant is required to advance the basis on which he asserts that the Labour Court failed to exercise its discretion in this regard judicially, was influenced by wrong principles or misdirected itself on the facts, which led it to arrive at a decision it could not reasonably have reached having regard to the relevant facts and principles. He failed to do so.
- [19] Despite repeated cautions raised by the respondent's attorneys that punitive costs would be sought against him, the appellant refused to change his course of action. He sought leave to amend the pleadings of an urgent application launched in 2018 to one in which a claim in contract was to be pursued under section 77(3), without putting up the contract, pleading the claim in the appropriate manner or pursuing the matter under a new case number. The appellant acted in a manner which displayed a disregard for his professional responsibilities. He refused to withdraw the matter and to pursue the applicant's claim in the manner required by law. Under oath, he falsely claimed that he had been granted leave to amend the applicant's pleadings when this was patently false. There is nothing advanced by the appellant which indicates that the Labour Court can be faulted for exercising its discretion in the manner it did. Having regard to the facts and the law, there is no indication that the Court was injudicious in the exercise of its discretion,

¹³ *South African Liquor Traders Association v Chairperson Gauteng Liquor Board and others* 2009 (1) SA 565 (CC) at para 54.

¹⁴ *Leibowitz t/a Lee Finance v Mhlana and others* [2005] ZASCA 126; [2006] 4 All SA 428 (SCA) at para 13.

that it was influenced by wrong principles or misdirected itself on the facts, or that it reached a decision on costs which it could not reasonably have reached. The appellant consequently has failed to show that he holds prospects of success on appeal.

[20] It follows for these reasons that the appellant's application for condonation cannot succeed both in respect of the late filing of the notice of appeal and the record of appeal must fail. The appeal cannot for this reason be reinstated.

[21] The respondents seek the costs of opposing the relief sought. There is no reason in law and fairness why such costs on the ordinary scale should not be granted against the appellant.

[22] In the result, the following order is made:

Order

1. Condonation for the late filing of the notice of appeal and record of appeal is refused.
2. The application to reinstate the appeal is refused.
3. The appellant is to pay the first and second respondents' costs on a party and party scale.

SAVAGE ADJP

Musi JA and Van Niekerk JA agree.

APPEARANCES:

FOR THE APPELLANT:

Mr M Lekhesa

Lekhesa Attorneys Inc.

FOR RESPONDENT:

Mr J Phillips

Cheadle Thompson and Haysom Inc.