

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 2581/21

In the matter between:

BONGA BALDWIN MAJOLA

Applicant

and

GENERAL PUBLIC SERVICE SECTOR

BARGAINING COUNCIL

First Respondent

ARBITRATOR E MAREE

Second Respondent

GAUTENG DEPARTMENT OF ROADS AND TRANSPORT

Third Respondent

Decided: In chambers

Delivered: 9 April 2024

**JUDGMENT:
APPLICATION FOR LEAVE TO APPEAL**

RALEFATANE AJ

Introduction

- [1] This is an application for leave to appeal against the whole of the judgment and order issued by this Court on 13 October 2023 where the Applicant's application seeking to review two rulings, the condonation ruling (dated 19 February 2021) and rescission ruling (dated 5 June 202) under case reference number GPBC 1594/2020, issued by the second respondent as the arbitrator under the auspices of the first respondent was dismissed by this Court.
- [2] The applicant's application for leave to appeal was out of time therefore, an application for condonation was made.

[3] On that score, there are two applications by the applicant before this Court, namely, an application for condonation for the late filing of the leave to appeal and an application for leave to appeal.

[4] This Court will first deal with the condonation application for the late filing of the application for leave to appeal and, depending on the outcome of the condonation application, the Court will either not proceed to deal with the application for leave to appeal should the condonation application fail, or to deal with it should the condonation application succeed.

Summary of the facts

[5] The applicant was dismissed by the third respondent allegedly for the protected disclosure he made regarding corruption that was happening at the third respondent's workplace.

[6] Fast forward, by the time the applicant referred the alleged unfair dismissal dispute to the first respondent for relief, the referral was already out of time and therefore required an application for condonation¹ which was refused by the first respondent and followed by a rescission² application which had also failed.

[7] Subsequently, the applicant applied to this Court for the review of both the condonation and rescission rulings and the applications failed before this Court hence this application for leave to appeal.

Condonation application

[8] The applicant's application for leave to appeal was four days out of time. The application for condonation was not opposed.

[9] In considering whether to grant condonation, there are principles set out in countless decisions of our courts.

[10] In *Academic & Professional Staff Association v Pretorius NO and Others*³, the Court discussed the principles for consideration and said that:

[17] The factors which the court takes into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non-compliance with the prescribed time frame; (b) the explanation for the lateness or the failure to comply

¹ The applicant seeks to review, correct and set aside the condonation ruling issued by the second respondent on 19 February 2021, case reference number GPBC 1594/2020.

² The applicant further seeks to review, correct and set aside the rescission ruling issued by the second respondent on 05 June 2021, case reference number GPBC 1594/2020.

³ [2007] ZALC 118; (2008) 29 ILJ 318 (LC) at paras 17 – 18.

with time frame; (c) prospects of success or *bona fide* defence in the main case; (d) the importance of the case; (e) the respondent's interest in the finality of the judgment; (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice...

[18] It is trite law that these factors are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may compensate the inadequate explanation and long delay.'

[11] This Court has considered amongst other factors, the reasons for the delay, the degree of lateness and the prejudice likely to be suffered by either party in granting the leave to appeal.

[12] In regard to the reasons for the delay, the applicant succeeded to persuade this Court by giving an account of the period of the delay.

[13] As far as the degree of lateness is concerned, the application for leave to appeal was four days late which the Court found to be minimal and further that the reasons justified the delay.

[14] In *Foster v Stewart Scott Inc*⁴, the principle was stated in the following manner:

It is well settled that in considering applications for condonation the court has a discretion, to be exercised judicially upon a consideration of all the facts. Relevant considerations may include the degree of non-compliance with the rules, the explanation therefor, the prospects of success on appeal, the importance of a case, the respondent's interest in the finality of the judgment, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice, but the list is not exhaustive. These factors are not individually decisive, but are interrelated and must be weighed one against the other. A slight delay and good explanation for the delay may help to compensate for prospects of success which are not strong.

Conversely, very good prospects of success on appeal may compensate for an otherwise perhaps inadequate explanation and long delay. See, in general, Erasmus Superior Court Practice at 360-366A.' [Own emphasis]

[15] Following the Court in *Foster*, where it was held that "...[a] slight delay and good explanation for the delay may help to compensate for prospects of success which

⁴ (1997) 18 ILJ 367 (LAC) at 369B – E.

are not strong...” this Court is of the view that the delay in *casu* is so *slight* that it can compensate the weak prospects of success.

[16] The issue of prejudice was also taken into account and in the Court’s view, four days’ delay will not cause prejudice to the third respondent should condonation be granted.

[17] Upon considering the facts relating to this unopposed application for condonation, this Court is persuaded to grant condonation, as it is hereby granted.

[18] Now that condonation is granted, the Court will turn to deal with the application for leave to appeal.

The test for granting leave to appeal

[19] The test for granting leave to appeal is directed by section 17 of the Superior Courts Act⁵ which provides for the criteria to be followed when deciding on the application for leave to appeal against the decision of courts *a quo* which also binds this Court.

[20] Section 17 indicates the following:

‘(1) 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;
- (b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.’ [Own emphasis]

[21] Laying emphasis on the instructive provisions of section 17 of the Superior Courts Act, the case of⁶ *Fusion* explains the imperatives of the section in the following terms:

‘Since the coming into operation of the Superior Courts Act, there have been a number of decisions of our courts which dealt with the requirements that an applicant for leave to appeal in terms of ss 17(1)(a)(i) and 17(1)(a)(ii) must satisfy in order for leave to be granted. The applicable principles have over time crystallised and are now well established. Section 17(1) provides, in material part, that leave to appeal may only be granted ‘where the judge or judges concerned are of the opinion that –

⁵ Act 10 of 2013.

⁶ [2021] ZASCA 10 (29 January 2021) at para 18.

- (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...”

It is manifest from the text of s 17(1)(a) that an applicant seeking leave to appeal must demonstrate that the envisaged appeal would either have a reasonable prospect of success, or, alternatively, that 'there is some compelling reason why an appeal should be heard'. Accordingly, if neither of these discrete requirements is met, there would be no basis to grant leave.’

[22] Section 17 raises relevant questions that this Court needs to consider and answer. These questions were unpacked and relevantly answered in the unreported case of *Bayi v Passenger Rail Agency of South Africa*⁷ as follows:

(i) Is this court of the opinion that if the leave to appeal is granted there would be a reasonable prospect of success?; or (ii) is there a compelling reason why the appeal should be heard by the Appeal Court considering further if there are conflicting judgments on the matter under consideration?; and (ii) is the decision sought to be appealed not disposing of all the issues in the case, would the appeal lead to a just and prompt resolution of the real issues between the parties? Each question will be dealt with in turn.

‘Is this Court of the opinion that if the leave to appeal is granted there would be a reasonable prospect of success?’⁸

[23] In *MEC for Health, Eastern Cape v Mkhitha and another*⁹ the Supreme Court of Appeal (SCA), laying emphasis on the strict application of section 17 on prospects of success, said the following:

‘[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there truly is a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success; or there is some other compelling reason why it should be heard.

[21] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable prospect or realistic chance of success on appeal. A mere possibility of success, an arguable case or one that is not hopeless, is not enough.

⁷ JR 652/18 (13 October 2023) at paras 2 - 7

⁸ Section 17(1)(a)(ii) of the Act.

⁹ [2016] ZASCA 176 (25 November 2016) paras 16 – 17.

There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.’ [Own emphasis]

[24] Unpacking the criteria of reasonable prospects of success, the SCA in *Smith v S*¹⁰ said:

‘What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court.¹¹ In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.’

[25] The assessment of reasonable prospects of success must be taken into consideration before granting leave to appeal. If there are no reasonable prospects of success it would be a futile exercise to grant leave to appeal and unnecessarily burden the Appeal Court with a matter that does not show reasonable prospects of success. In *casu*, the Court is of the opinion that the applicant’s matter does not truly have reasonable prospects of success. Therefore, the application has failed on this requirement.

*Is there a compelling reason why the appeal should be heard by the Appeal Court considering further if there are conflicting judgments on the matter under consideration?*¹²

[26] The Court in *Fusion*¹³ dealt with the requirement of compelling reason and said that:

‘...’

It is manifest from the text of s 17(1)(a) that an applicant seeking leave to appeal must demonstrate that the envisaged appeal would either have a reasonable prospect of success, or, alternatively, that 'there is some compelling reason why an appeal should be heard'. Accordingly, if neither of these discrete requirements is met, there would be no basis to grant leave...’ [Own emphasis]

¹⁰ [2011] ZASCA 15; 2012 (1) SACR 567 (SCA) at para 7.

¹¹ *S v Mabena and another* 2007 (1) SACR 482 (SCA) at para 22.

¹² Section 17 (1) (a) (ii) of the Act.

¹³ *Fusion supra* at para 18.

[27] The Applicant must demonstrate compelling reason(s) to persuade this Court to grant leave to appeal. In the submissions, the Applicant reiterated the arguments as proffered in the judgment delivered on 24 August 2023. In this regard, to grant leave to appeal on the same arguments proffered in the main judgement and on the postulation that the Appeal Court may arrive at a different decision would not be sufficient. Further, the facts of the case do not involve conflicting judgments as it is a clear matter that is guided by many judgments of various Courts, some decided by the Appeal Court, concurring that a salary adjustment/increase is not a benefit in terms of the Labour Relations Act¹⁴ (LRA). On that score, this Court is not persuaded to reasonably believe that another Court *would* reach a different conclusion other than the one reached by this Court.

*Is the decision sought to be appealed not disposing of all the issues in the case, would the appeal lead to a just and prompt resolution of the real issues between the parties?*¹⁵

[28] Justice and fairness dictate that the decision-maker must be lively to the promotion of justice and fairness while observing the ethos of the LRA in relation to the prompt resolution of disputes. Justice and fairness direct that the Court should not unnecessarily refuse the granting of the leave to appeal in the name of promptly resolving the issues, likewise, the Court should not grant leave to appeal in the fear of opinions on not observing justice and fairness even though there are no prospects of success on the matter.

[29] If the decision sought to be appealed against does not dispose of all the issues in the case, the court should consider whether granting the leave to appeal would deliver justice¹⁶ to the real issues.

[30] The Constitutional Court in *General Council of the Bar of South Africa v Jiba and Others*¹⁷ further said:

'The interests of justice enquiry, on the other hand, involves the weighing up of varying factors. These include reasonable prospects of success which, although not determinative, carry more weight than other factors. In a case where, as here, the matter has been to the Supreme Court of Appeal the presence of reasonable

¹⁴ Section 186(2)(a) of the Labour Relations Act 66 of 1995, as amended.

¹⁵ Section 17 (1) (c) of the Act

¹⁶ See: *General Council of the Bar of South Africa v Jiba and others* [2019] ZACC 23; 2019 (8) BCLR 919 (CC).

¹⁷ Ibid at para 36.

prospects of success constitutes a compelling reason for granting leave.’ [reference omitted and own emphasis]

[31] Only matters with real reasonable prospects of success can pass the test for granting leave to appeal in that, in the absence of such realistic and convincing reasonable prospects of success, leave to appeal would be fruitless as there is no hope that another court would arrive at a different conclusion than the court *a quo* hence in the case of *Mahlangu v South African Transport and Allied Workers Union*¹⁸ it was emphatically stated that leave to appeal must not be granted lightly and further that:

[15] The test is not whether there is a possibility that another court could come to a different conclusion, the test is whether there is a reasonable prospect that another court would come to a different conclusion.

[16] It is further trite that an applicant in an application for leave to appeal must convince the court *a quo* that it has reasonable prospects of success on appeal. Appeals should be limited to matters where there is a reasonable prospect that the factual matrix could receive a different treatment or where there is some legitimate dispute on the law.’

[32] Leave to appeal cannot be made because the applicant suddenly discovered another strategy to argue the case or applying leave to appeal based on throwing the dice or on the unrealistic hope that another court will come to a different conclusion. The applicant, in this case, is re-arguing the case which is not assisting the Court. After considering the requirements for a test to grant leave to appeal, this Court found no basis to grant leave to appeal.

[33] In the premise, the following order is made:

Order

1. The applicant’s application for condonation for the late filing of the application for leave to appeal is granted;
2. The applicant’s application for leave to appeal is dismissed;
3. There is no order as to costs.

MJ Ralefatane
Acting Judge of the Labour Court of South Africa
Appearances: Decided in Chambers

¹⁸ [2023] ZALCJHB 238 (4 August 2023) at paras 15 – 16.

LABOUR COURT