

**THE LABOUR COURT OF SOUTH AFRICA,
JOHANNESBURG (POLOKWANE)**

Case No: JR 2368/22

In the matter between:

JOSEPH LEONARD MAREMANE

Applicant

and

**POLOKWANE LOCAL MUNICIPALITY
SOUTH AFRICAN LOCAL GOVERNMENT
BARGAINING COUNCIL
MS RANTHO, N**

First Respondent

Second Respondent

Third Respondent

Heard: Considered in Chambers

Delivered: This judgment was handed down electronically by emailing a copy to the parties. 12 April 2024 is deemed to be the date of delivery of this judgment.

Summary: Application for leave to appeal against judgment handed down on 15 February 2024. Decided in chambers. The application for leave to appeal is dismissed.

JUDGMENT

DANIELS J

Introduction

- [1] The applicant seeks leave to appeal against the judgment of this court dismissing its application to reinstate a review application, which was deemed to be withdrawn in accordance with clauses 11.2.2 and 11.2.3 of the Practice Manual.

Legal Principles: Leave to Appeal.

- [2] In *J & L Lining (Pty) Ltd v National Union of Metalworkers of SA and Others* (2)¹ this Court summarized the legal position when seeking leave to appeal as follows:

‘Leave to appeal is not there for the asking. When deciding whether to grant leave to appeal to the Labour Appeal Court, the Labour Court must determine whether there is a reasonable prospect that another court would come to a different conclusion to that of the court a quo, or in other words, whether the appeal would have a reasonable prospect of success. This was summarised in SA Clothing & Textile Workers Union & others v Stephead Military Headwear CC, as follows:

‘It is trite that for an application for leave to appeal to be successful, it is required of the party seeking such leave to demonstrate that there are reasonable prospects that another court, in this instance, the Labour Appeal Court, would come to a different conclusion to that reached in the judgment that is sought to be taken on appeal.’ (Own emphasis)

- [3] As to the meaning of ‘reasonable prospects of success’, the Court in *Member of the Executive Council for Health, Eastern Cape v Mkhitha and Another*² said the following:

‘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

¹ (2019) 40 ILJ 1303 (LC) at para 5.

² [2016] JOL 36940 (SCA) at paras 16 – 17.

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.

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. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal.'

Legal Principles: Practice Manual

- [4] It is trite that the Practice Manual is binding. It is also trite that, where a review is deemed to be withdrawn in terms of the Practice Manual, it may be reinstated via a substantive application demonstrating good cause. In *Samuels v Old Mutual Bank*³ 'good cause' was described by the LAC as follows:

'In essence, an application for the retrieval of a file from the archives is a form of an application for condonation for failure to comply with the court rules, time frames and directives. Showing good cause demands that the application be bona fide; that the applicant provides a reasonable explanation which covers the entire period of the default; and show that he/she has reasonable prospects of success in the main application, and lastly, that it is in the interest of justice to grant the order. It has to be noted that it is not a requirement that the applicant must deal fully with the merits of the dispute to establish reasonable prospects of success. It is sufficient to set out facts which, if established, would result in his/her success. In the end, the decision to grant or refuse condonation is a discretion to be exercised by the court hearing the application which must be judiciously exercised.'

³ (2017) 38 ILJ 1790 (LAC)

- [5] In *NEHAWU on behalf of Mofokeng and others v Charlotte Theron Children's Home*⁴ in relation to condonation, the LAC held that, without a reasonable and acceptable explanation for a delay, the prospects of success are immaterial. This court found that there was no adequate explanation for the delay, and, in addition, there were no reasonable prospects of success in the review itself.
- [6] When seeking condonation, the applicant must set out a sufficiently full and adequate explanation – not a vague or general one.⁵ There should be an explanation for each period of the delay. This court found that significant periods were unexplained.

Grounds for the application for leave to appeal.

- [7] The applicant contends that this court failed to have regard to the true duration of the delay in the filing of the record. With respect, I do not understand how this submission is made in light of the following:

7.1.1 In paragraph 48 of its founding affidavit, the applicant alleged that its attorneys were notified by the Registrar that the arbitration record had been filed on 27 October 2022.

7.1.2 The 60 days period in clauses 11.2.2 and 11.2.3 therefore expired on 23 January 2023, when the review was deemed to have been withdrawn.

⁴ (2004) 25 ILJ 2195 (LAC) at para 23

⁵ *MEC for the Department of Cooperative Governance & Traditional Affairs, KwaZulu-Natal v Nkandla Local Municipality & others* (2022) 43 ILJ 505 (CC) at para 66

7.1.3 The applicant states that the record was filed approximately two months late.

7.1.4 In its founding affidavit, the applicant provides no explanation as to what steps it took between 27 October and 8 December 2022 to prepare and file the arbitration record.

[8] As explained above, there must be a sufficiently full explanation for each period of the delay. Despite this, the applicant provided no explanation for a period of over a month. There is no prospect that the LAC will find that the applicant has provided a reasonable explanation for the delay when a period of more than a month remains unexplained.

[9] The applicant maintains that it has reasonable prospects of success in the review because the arbitrator irregularly admitted hearsay evidence (relating to the evidence at the disciplinary hearing) and refused to allow him to call witnesses. I cannot see how another court would possibly accept this submission. The arbitrator's interlocutory ruling on hearsay evidence was comprehensive, and he exercised his discretion after consideration of all the factors in section 3(1)(c) of the Law of Evidence Amendment Act. In this regard:

9.1 The arbitrator took into consideration that the disciplinary hearing was concluded **more than ten (10) years ago** - on 29 February 2012, after which the applicant was dismissed.

9.2 At the disciplinary hearing, the applicant brought legal proceedings against the employer's principal witness, the municipal manager, alleging that she was defaming him.

9.3 When the matter was scheduled for arbitration at the end of March 2022 (more than 10 years after the disciplinary) an impromptu application was made by the respondent to admit all the evidence from the disciplinary hearing.

9.4 The employer's witnesses were afraid to testify for fear that this would lead to legal action against them.

9.5 The arbitrator required a formal application to admit the hearsay evidence and allowed the parties an opportunity to argue such application.

9.6 At the disciplinary hearing, the parties were legally represented, the witnesses were robustly cross examined, and the evidence was mechanically recorded and transcribed.

[10] Section 138(1) of the Labour Relations Act No. 66 of 1995 (the LRA) requires the commissioner to conduct the arbitration with the minimum of legal formalities. Section 138(2) grants the commissioner a discretion as to the form of the arbitration. This approach is necessary to achieve one of the prime objects of the LRA – expeditious dispute resolution.

[11] In its application for leave to appeal, the applicant raises other issues of no moment. The real issue in the review application was the alleged improper admission of hearsay evidence at the arbitration. Nevertheless, for the sake of completeness, these side issues are considered:

11.1 The applicant alleges that this court erred when it found that the employer *applied* to admit evidence of a hearsay nature (record of the internal disciplinary hearing). The court relied on paragraph 21 of the applicant's founding affidavit which stated: "*The municipality then*

filed an application to use the record of the disciplinary proceedings and the record of the arbitration proceedings as the full and final record for the purpose of the arbitration." This point is clearly without merit.

11.2 The applicant alleges that this court erred in finding that he had been found guilty of charge 1.2(c). Nothing turns on this. It is correct that the arbitrator found the applicant guilty of charges 1.2(a) and 1.2(b) and made no reference to charge 1.2(c). The applicant was found guilty of charges that he was grossly dishonest - because he applied for annual leave to frustrate the Portfolio Committee meeting, and he gave Councillor Kaka the wrong impression that he would prepare for and attend the Portfolio Committee meeting. These were serious charges, for which he was found guilty and dismissed.

11.3 The applicant alleges that this court erred by stating that an audit report *found* that the applicant had received a payment of R 600 000, 00 from a building contractor who whose building plans had not been approved. As explained, this is without merit:

11.3.1 The court relied on what was stated in paragraph 16.1 of the founding affidavit to the effect such evidence had been presented at arbitration. This appeared from the review papers too.

11.3.2 More importantly, this issue (referred to in the section dealing with background facts) played no role in any determination of the prospects of success on review. It was common cause that the applicant was not charged or dismissed for the allegations that he was irregularly paid R600 000, 00.

11.4 It is alleged that the court erred by failing to consider that the Portfolio Committee meeting of 13 December (which the applicant failed to attend) was only scheduled on 10 December – and the employee applied for leave on 3 December. This was no error. The arbitration award recorded the evidence of Mr. Powell, who denied that the meeting was arranged on 10 December. The applicant's version was, in any event, a highly unlikely.

[12] In the result the application for leave to appeal is dismissed. There is no order as to costs.

R Daniels

Judge of the Labour Court of South Africa